170 PLAINTIFF'S EXHIBIT "L".

"Contract of Account in Participation Entered Into Between Benito Legarda, as Manager of the Firm of Tuason, Legarda & Co., and Patricio Ubeda.

"1. Benito Legarda, as the Manager of the firm of Tuason, Legarda & Co., hereby transfers to Patricio Ubeda an interest in an account which shall be kept separate from all others in the books of the firm, and which said account shall be designated 'Manufacture of Wines and Liquors', under the terms and conditions hereinafter set out.

"2. Patricio Ubeda contributes as his share in the said business all the articles enumerated in the inventory attached to this contract at the prices therein specified and the aggregate value of which is $9,000.00, Mexican currency. If on account of any rules or laws which may be promulgated by the Government, the labels, capsules, products, etc., included in the property thus specified in the said inventory, cannot be used, the agreed value of the same shall be deducted from the total value shown in said inventory and Mr. Ubeda will substitute cash therefor.

"3. Benito Legarda agrees to furnish the funds which may
171 be necessary to buy all utensils, apparatus and fixtures which may be necessary and indispensable for the distillation and manufacture of all kinds of wines and liquors, in such sum as may be considered necessary.

"4. Mr. Ubeda hereby agrees to personally devote himself to the manufacture of wines and liquors at the establishment known as 'La Rosario,' supervising the manufacture of the same in person without the intervention of any other person, either in his methods, or in the actual manufacture of the same, he, therefore, being the only technical director and person responsible for the products manufactured by him, which shall bear his name on the labels to be placed on the goods before they are sold on the market, in order to distinguish them from the other liquors distilled at the said distillery 'La Rosario.'

"5. Both parties, Benito Legarda in his aforesaid capacity, and Patricio Ubeda, in proportion to their respective share in this account, shall divide between them any profits which may accrue, but this only in case after the books are balanced there is any cash on hand. Mr. Ubeda, in addition to the foregoing limitation, hereby agrees not to draw his share of the profits until he has to his credit an amount equal to that contributed by Messrs. Tuason, Legarda & Co. He may, however, draw monthly for his own private expenses the sum of $150.00, which shall be charged up to his account.

"6. The capital contributed by Mr. Legarda in excess of
172 the $9,000.00 which, according to paragraph 3 of this instrument, Mr. Legarda has contributed, shall bear interest at the rate of 10% per annum, and any amount of profits that the parties

may see fit not to withdraw from the common fund but invest in the business itself shall also bear interest at the same rate.

"7. The period for which both parties hereby agree to continue this business will be five years, which may be extended at the will of the parties.

"8. In case of the death of either of the parties hereto, the said account shall be liquidated and all assets belonging thereto sold, unless the surviving partner and the heirs of the deceased may agree to continue the business between them.

"9. The account in question will be balanced every six months.

"In Witness Whereof the parties have signed this instrument, in duplicate, in Manila the 18th day of November, 1901.

(Signed) "BENITO LEGARDA.
(Signed) "PATRICIO UBEDA."

(Here follow photographs marked pages 173 and 174.)

PLAINTIFF'S EXHIBIT "N".

6-8

c/b

175 PLAINTIFF'S EXHIBIT "I."

War Department,
Bureau of Insular Affairs,
Office of the Philippine Government Board in the United States for the Louisiana Purchase Exposition, St. Louis, 1904.

Philippine Exposition Board:

W. P. Wilson, Chairman.
Gustavo Niderlein, Director of Exhibits.
Pedro A. Paterno, Member in Charge of Representation.
Leon M. Guerrero, Secretary.
Edmund A. Felder, Executive Officer.
Carson Taylor, Disbursing Officer.
Harry C. Lewis, Cashier.

Offices:
Philippine Exposition Grounds, World's Fair, St. Louis.

ST. LOUIS, MO., *November* 1, 1904.

SIR: We have the pleasure to inform you that the Honorable Philippine International Jury of the Exposition, under the presidency of the Secretary of War, Honorable William H. Taft, has awarded to you a gold medal for your wines and alcohols.

In congratulating you upon this merited distinction and again thanking you for your enthusiastic participation in the contest in which the Philippines have made a remarkable showing, we take pleasure. We have the honor to be,

Yours respectfully,

(Sgd.) GUSTAVO NIEDERLEIN,
Secretary of the Supreme Jury.

(Sgd.) LEON M. GUERRERO,
Assistant Secretary of the Supreme Jury.

Mr. Patricio Ubeda, Manila, P. I.

176 I certify that the foregoing is a true and correct copy of its original, introduced in evidence in Case No. 4233, entitled "Ubeda vs. Zialcita."

Manila, February 8, 1907.

(Signed) PEDRO DE TORRES,
Assistant Clerk of the Court of First Instance of Manila.

Indorsed.

I have received the original document referred to in the foregoing certificate.

(Signed) PATRICIO UBEDA.

177 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the City of Manila.

No. 4233.

PATRICIO UBEDA
versus
AGAPITO ZIALCITA.

The hearing of this cause having commenced, and after plaintiff had introduced his evidence, counsel for defendant asked that the action be dismissed and that he be absolved of the complaint, to which petition counsel for plaintiff objected, praying further that in case the motion to dismiss be denied, final judgment be entered in accordance with the allegations of the complaint and that defendant be not permitted to introduce any evidence in his behalf.

After an examination of the evidence introduced by plaintiff in this case, the court is of the opinion, without now making any finding which might affect in any way the final disposition of the case, that the motion to dismiss should be denied and that the defendant should be permitted to introduce evidence in support of the allegations contained in his answer, and such further evidence as may tend to overcome that introduced by plaintiff.

Defendant's motion for dismissal on the ground that plaintiff has failed to establish the allegations of his complaint cannot be
178 construed as an implied waiver of his right to introduce such evidence as he may see fit. On the contrary, this being a right accorded to him by law, his motion to dismiss having been denied and overruled, he can now avail himself of that right.

It is accordingly adjudged and decreed that the motion to dismiss be denied and it is ordered that the trial of the cause be proceeded with and that the defendant may introduce such evidence as may be proper, and that such trial be continued on Wednesday, the 20th instant, at 8:30 a. m.

Manila, March 12, 1907.

(Signed) MANUEL ARAULLO, *Judge.*

On this 12th day of March, 1907, copy of the foregoing order was sent to the assessors in this case and the attorneys for both parties.

(Signed) PEDRO DE TORRES.

179 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the City of Manila.

No. 4233.

PATRICIO UBEDA, Plaintiff,
versus
AGÃPITO ZIALCITA, Defendant.

Exception.

Comes now the plaintiff and excepts to the order of the court permitting the defendant to introduce evidence after his motion to dismiss the complaint for failure of proof was denied.

Wherefore plaintiff prays the court to allow this exception as presented in due time and form.

Manila, March 14, 1907.

(Signed) W. A. KINCAID,
Counsel for Plaintiff.

Exception noted March 14, 1907.

(Signed) MANUEL ARAULLO, *Judge.*

180 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the City of Manila, Part III.

Civil Case No. 4233.

PATRICIO UBEDA, Plaintiff,
versus
AGAPITO ZIALCITA, Defendant.

Comes now the defendant in the above-entitled cause and respectfully excepts to the order of this court, dated March 12, 1907, in so far as it denies and overrules defendant's motion to dismiss plaintiff's complaint.

Manila, March 15, 1907.

(Signed) FELIPE BUENCAMINO,
Counsel for Defendant.

No. 99 P. Herrera, Tondo.

(Signed) RAMÓN DIOKNO,
Counsel for Defendant.

No. 66 Illaya, Tondo, Manila. Tel. No. 660.

Copy furnished plaintiff.

Exception noted this 15th day of March, 1907.

(Signed) M. ARAULLO, *Judge.*

181 DEFENDANT'S EXHIBIT "1".

La Rosario,

Distillery of Alcohols, Wines and Liquors.

No. 210 San Sebastian.

Trademark:

To avoid imitations our labels have been registered and bear our signature.

Three Bells Gin.

Representation of Three Bells, and signature of Patricio Ubeda written across the label.

Extra Superior.

Patricio Ubeda, Manila.

MANILA, *February* 1, 1906.

Mr. —— ——,

DEAR SIR: We beg to enclose herewith poster advertising our special brand of gin, known as "Tres Campanas", of Patricio Ubeda, which has been very favorably received by the public on account of its pleasant taste and flavor, it having been awarded a silver medal at the Exposition of Hanoy in 1902 and a gold medal at the St. Louis Exposition in 1904.

The quality and excellence of the said gin, "Tres Campanas", of Patricio Ubeda, is shown by the great demand for this product in all the provinces of the Philippine Islands, by the prizes awarded it at the Expositions and by the many imitations of the same which now appear on the market, with One, Two, Four and Five Bells. Everybody wants to imitate it, but unsuccessfully. The real brand is that of the "Tres Campanas" of Patricio Ubeda. The foregoing clearly shows that this gin manufactured in the Philippine Islands is just as good as any other gin manufactured in any part
182 of the world. We have right here in the country the principal ingredient, sugar cane, at a very low price, (unfortunately so for Philippine agriculture) an ingredient which cannot be freely used in the preparation of liquors in other parts of the world on account of the high price of the same.

We invite you to try our gin, which is put up in square-faced bottles, black and white glass, and may be found for sale in all the principal stores of the City of Manila and provinces, and it will be a great pleasure for us to learn that it is to your liking, and we would be very pleased if you would give your preference to this native industry, whose products can successfully compete with the imported article both in price and quality.

We beg to remain,

Yours truly,

LA ROSARIO.

185 (Here follows poster marked pp. 183 & 184.)

(Here follows label marked pp. 186 and 187.)

"LA ROSA

ANTES DE TOMAR LA GINEBRA MARCA PATRICIO UBEDA

DESPUES DE TOMAR LA GINEBRA MARCA PATRICIO UBEDA

ARIO' Fábrica de Alcoholes

JEREZ

ANIS DEL PEREZOSO

VERMUTH

COGNAC

WHISKY

MOSCATEL

Varios licores y vinos tintos dulces

SAN SEBASTIAN 202 AL 220

Exh. "3"

Para evitar la falsificacion nuestras etiquetas se hallan depositadas en nuestra firma
GINEBRA DE LA CAMPANA
Ex. 3
EXTRA SUPERIOR
VAN DEN BERGH & C.ie
Ex. 3
AMBERES

188 DEFENDANT'S EXHIBIT "4".

ANVERS, le —, 190–.

Distillerie-Brasserie-Malteria La Cloche.
Representation of One Bell.
Affaires Generales. Van Den Bergh & Co., Anvers.
Levure Fine Pour La Panification Levure, Mere.
Telegrammes, Cloche-Anvers.
Copy.

MANILA, *December* 2, 1904.

Messrs. Van Den Bergh & Co., Amberes.

DEAR SIRS: Following instructions from Mr. Legarda, I have the pleasure to inform you that on December 16th, 1898, I was the owner of the gin trademark Three Bells for the Philippine Islands, which is registered under No. 8, page 3, in the Registry of Industrial and Commercial Trademarks, and that I believe I have a right to use the said trademark for the reason that I am the sole owner of the same in these Islands.

Yours truly,
(Signed) PATRICIO UBEDA.

189 DEFENDANT'S EXHIBIT "5".

MANILA, P. I., *October* 24, 1904.

Messrs. Van Den Bergh & Co., Anvers.

DEAR SIRS: We acknowledge receipt of yours of September 13th last, and in reply to same beg to state that although Mr. Patricio Ubeda is now absent from these Islands, we know that during the Spanish regime he had the trademarks used by him duly registered in accordance with the law then in force and that the said trademarks are protected by the Treaty of Paris. You may, however, verify these statements on our part. Under our contract with Mr. Ubeda we are not responsible for the trademarks which he may see fit to use and may have a right to use, that being a matter as to which he only is responsible. You will readily understand that your threats to institute judicial proceedings can in no way affect us, for we are neither imitators nor forgers of your trademark.

Upon his return, we will request Mr. Ubeda to send you a copy of his certificates of registration, giving you all the necessary explanation in order to convince you that he is using his trademarks lawfully. If Mr. Ubeda's explanation be not entirely satisfactory to us, you can rest assured that we will be the first ones to prevent his further use of the trademark in question.

190 We beg to remain,
Yours respectfully,
(Signed) BENITO LEGARDA.

191 DEFENDANT'S EXHIBIT "6."

The Government of the Philippine Islands.

Executive Bureau.

Division of Archives.

Manila.

General Direction of Civil Administration.—Interior.—Proceedings relating to the losses suffered by the Royal Economic Society of Friends of the Country as a result of the fire which occurred September 28, 1897.—1897.—Royal Economic Society of Friends of the Country of the Philippines.—Sir.—I am sorry to inform Your Excellency that during the fire which occurred in the Walled City early on the morning of the 28th of last month, one of the buildings destroyed by the said fire was that Numbered 36 Magallanes Street, occupied by the headquarters of this Royal Society, the conflagration having destroyed the archives, library and museum, and everything having been lost except a few books, among which are found the Official Registries of Industrial and Commercial Trademarks, of which this corporation is in charge; also the indexes corresponding to the said Registries, but all the proceedings and documents relating to the granting of trademarks have disappeared.

Fortunately, due to the form in which this Society has kept the said Registries and the manner in which the entries therein have been made whenever His Excellency, the Governor-General of these Islands, has seen fit to either grant or deny any of the petitions for the registration of trademarks, it will be possible to furnish
192 any information which may be required in future in connection with similar petitions with the necessary accuracy and correctness to secure the rights of those who have already had their trademarks registered and granted.—We very much regret the loss, Your Excellency, but, having these registries and indexes at hand, the proper discharge of the duties and trust devolving upon and committed to this Royal Society will not be hindered or impeded in any way.—I cannot, however, say the same with reference to the certificates of commercial and industrial trademarks issued by the Minister of the Interior, of which your department always has furnished a copy for the files of this Society; those certificates were bound together, and not one of them was saved from the conflagration. For the purpose of replacing this important part of the archives of this Society concerning the registration of trademarks, I will respectfully ask Your Excellency to give the necessary orders to the proper department directing that this Society be furnished with other copies of the said certificates, if possible, and that if the same cannot be furnished by your department, that you ask the Minister of the Interior to do so. I would also request Your Excellency to direct that this Society be furnished with a complete set of the Bul-

letin of Trademarks and Copyrights published by the said Minister of the Interior. This will enable us to know what trademarks have been authorized by the said department, all of which is very essential for the proper enforcement of the rules governing the same.—

193 I also beg to inform Your Excellency that the archives destroyed by the conflagration in question contained the proceedings relating to the trademarks referred to in the attached list, and which were then awaiting the action of this Society, with the original petitions, and, for the purpose of avoiding any further losses to the parties concerned, I take the liberty to suggest to Your Excellency that it would be advisable to notify them through the Official Gazette that they may renew their applications if they so desire.—I regret very much, Your Excellency, that the circumstances and the nature of the conflagration have been such that I do not now have the pleasure to inform you that the said files referring to trademarks, etc., were entirely saved.—May God guard Your Excellency many years. Manila, October 18, 1897.—The Director.—Manuel del Busto.—The Secretary.—Emilio de la Guardia.—To His Excellency, The Director-General of Civil Administration.—Seal: General Direction of Civil Administration.—Received, October 22, 1897.—Referred to Department of Industry and Commerce.

Royal Economic Society of Friends of the Country of the Philippines.—Petitions awaiting report of this Society, and which were destroyed during the fire on the 28th of September, 1897.

Names.	Denominations.
D. a Bartola Liuanag	Para faba. de tabacos "El Cazador."

194

Sres. Buttner Herman y Ca	Para faba.	de tabacos	"El Aguila del Mundo."
Cristina Baluyot	Id.	Id.	"La Cármen."
Chino Chua- Pengco	Id.	Id.	"La Caballeria."
Chino Manuel Nubla	Id.	Id.	"La Música."
" Siao- Liong Tuan	Id.	Id.	"El Cinife."
" El mismo	Id.	Id.	"La Pintura."
" Lim- Tinchi	Id.	Id.	"La Protectora."
" El mismo	Id.	Id.	"La Fortuna."
" Lim- Cuan	Id.	Id.	"Damasco."
D. a Benita Martinez	Id.	anizados	"La Perfección."
D. Maximiliano L. Tornow	Id.	tabacos	"High Life."
Sres. Baer Senior y Ca	Id.	Id.	"La Mota."
D. Timoteo Trinidad	Para faba.	tabs.	"La Soledad."
" Francisco Fuset	Id.	Id.	"La Giralda."
" El mismo	Id.	Id.	"La Perla del Occidente."
Da. Florentina Garcia	Id.	Id.	"La Sta. Bárbara."
" Eduardo André	Id.	de comercio	"El Excelsior."
Sres. Hollman y Ca	Id.	Id.	Id.

Manila, October 18, 1897.—The Secretary.—Emilio de la Guardia.

Office of the Director-General of Civil Administration of the Philippines.—To His Excellency.—The Director of the Royal Economic Society of Friends of the Country, on the date of the 18th instant, informs you that during the fire which occurred in the
195 Walled City early on the morning of the 28th of last month, one of the houses destroyed by the conflagration was that numbered 36 Magallanes Street, in which the said Society had its domicile, the fire having destroyed the archives, library and museum, only a few books having been saved, among which are found the Official Registries of Commercial and Industrial Trademarks and the indexes corresponding to the same.—That for the purpose of replacing this important part of the archives relating to the registry of the trademarks issued by the Minister of the Interior, he respectfully requests Your Excellency to direct that this office furnish the said Society with new copies of the certificates of said trademarks, if possible, and that if the same cannot be furnished by this department, that they be obtained from the said Minister; also a complete set of the Bulletin of Trademarks and Copyrights published by the said department.—He finally encloses a list of all petitions for the registration of trademarks then pending or awaiting the report of the said Society, and suggests that in order to avoid any further loss to the petitioners that they be notified through the Official Gazette that they can renew their petitions if they so desire.—Note.—Taking into consideration the reasons stated by the Director of the Royal Economic Society of Friends of the Country in the foregoing communication and for the purpose of the reorganization of the archives of the said Society which were destroyed during the fire of the 28th of September last past, this department is of the opinion that Your Excellency can propose to the higher au-
196 thorities that a communication be sent to His Excellency, The Minister of the Colonies, with the request that he furnish this department with new copies of the certificates of trademarks issued by the Minister of the Interior; also a complete set of the Bulletin of Trademarks and Copyrights published by the said department.—At the same time Your Excellency may direct that a notice be published in the Official Gazette containing the attached list of the names of the persons who have presented petitions for the registration of trademarks, so that they may renew such petitions if they so desire.—Your Excellency, however, will take such action as he may deem advisable.—Manila, October 26, 1897.—Eugenio Cansino.—Manila, November 12, 1897.—His Excellency.—No objection.—J. D. de la Cortina.—Approved.—Manila, December 12, 1897.—Moncada.—To the margin—P. de Rivera.—Division of the Interior.—Agriculture, Industry and Commerce.—Communication from the Director of the Royal Society of Friends of the Country requesting that he be furnished with certain necessary information on account of his archives having been destroyed by fire on September 28th.—Suggests that notice be published in the Official Gazette to applicants advising them that they may renew their applications if they so desire, and requests that he be furnished with copies of the trademarks issued by the Minister of the Interior.—

The Government of the Philippine Islands.—Civil Administration.—His Excellency, The Administrator of the Colonies.—December 20, 1897.—Your Excellency.—I am sorry to inform you that during the fire which occurred in the Walled City early
197 on the morning of the 28th of September last, one of the buildings destroyed was that numbered 36 Magallanes Street, occupied by the headquarters of the Royal Economic Society of Friends of the Country, the conflagration having completely destroyed the archives, library and museum, nothing having been saved except a few books, among which are found the Official Registries of Commercial and Industrial Trademarks kept by the said Society. For the purpose of replacing this important part of the archives relating to trademarks, I have the honor to request that Your Excellency ask the Minister of the Interior to send new copies of the certificates of trademarks heretofore issued by him, as well as a complete set of the Bulletin of Trademarks and Copyrights published by the said department, for the purpose of knowing what trademarks have been granted by the said Minister, this information being absolutely necessary for the proper enforcement of the rules relating to the same. May God, etc.—There is a rubric.

I certify that the foregoing is a true and correct copy of its original on file in this office, which I seal and sign in Manila the 9th day of April, 1907.

[SEAL.] (Signed) M. DE IRIARTE.
Chief of Division.

Documentary Stamp 20 centavos. Executive Bureau, Division of Patents, Copyrights and Trademarks.

198 DEFENDANT'S EXHIBIT "7."

General Direction of Civil Administration.—Division of the Interior.—Proceedings relative to the petition of Vicente Trius for a trademark for vermouth wines.—1898.

General Direction of Civil Administration.—Philippines.—Sir.—The Royal Economic Society of Friends of the Country has the honor to return herewith the papers relating to the petition presented by Vicente Trius for a trademark for vermouth wines, with the information that a comparison made by the Board of Directors of the said Association of the said trademark with those which now exist in this general registry shows that the said trademark resembles very much that of José Delgado, which was registered April 11th of last year.—NOTE.—In view of the foregoing indorsement and in conformity with the provisions of Section 5 of the Rules promulgated October 26, 1888, the undersigned is of the opinion and so recommends that Your Honor suggest to His Excellency, the Governor-General, that the petition presented by Vicente Trius should be denied.—Your Honor, however, will take such action as he may deem most advisable in the premises.—Manila, February 9, 1897.—Federico Lesaun.—February 12, 1897.—His Excellency: Referring to the division for information.—P. A.—José Folla.—February 12,

1897.—E. S.—Referred to the Director for remarks.—J. Bores y Romero.—February 15, 1897.—Approved. — Zappino. — Complied with February 22, 1897.—To His Excellency.—Vicente

199 Trius, a merchant of this city, presented a petition to the Director-General on October 23rd last, stating that his former petition for a trademark for vermouth wines manufactured by him had been denied on account of the indorsement and recommendations of the Royal Economic Society of Friends of the Country. Believing as he does that the trademark in question does not in any way resemble the trademark of José Delgado, he hereby asks Your Honor to set aside his former order of the 15th of February of last year, and that the necessary patent for the said trademark be issued to him for the reasons hereinbefore stated The matter was referred to the Royal Economic Society of Friends of the Country for information, and the said corporation returned the papers on January 26th last past, with the statement that an examination of the General Registry of Trademarks kept by it shows that there is no trademark therein which resembles that of the petitioner, adding that the archives and records of the said corporation having been destroyed by the fire which occurred in the Walled City on the 28th of September last, and they having at present no record other than the said registry, they are unable to say whether among the trademarks registered with the Minister of the Interior there is any one which resembles that of Mr. Trius, and that it was upon this assumption that the former indorsement was based. The only peculiarity which the Board of Directors discovered from an examination of the labels is that although the wine appears to have been manufactured in Spain, the words on the labels are in the Italian language.—

200 NOTE.—In view of the report of the Royal Economic Society of Friends of the Country contained in the foregoing endorsement, this bureau is of the opinion that Your Honor may recommend to the Governor-General that a sample of the label in question be sent to the Minister of the Colonies for information as to whether among the trademarks which are registered with the Minister of the Interior at Madrid, there is any which resembles that of Vicente Trius.—Your Excellency, however, will take such action as he may deem proper.—Manila, March 22, 1898.—Antonio Escartin.—Manila, March 23, 1898.—Approved.—P. A.—José B. A. de Mendieta.—Manila, March 23, 1898.—Approved.—E. S.—L. Moncada.—P. de Rivera.—Section of the Interior.—Agriculture, Industry and Commerce.—Recommending that a copy of the trademark for vermouth wines submitted by Vicente Trius be sent to the Minister of the Colonies for information as to whether there is any trademark now on file with the Minister of the Interior which in any way resembles that of the petitioner, Mr. Trius.

The Government-General of the Philippine Islands.—Civil Administration.—To his Excellency, The Minister of the Colonies.—April 2, 1898.—Sir.—Vicente Trius, a merchant of this city, having presented a petition for a trademark to distinguish the vermouth wines manufactured by him as he alleges at his own distillery in Villafranca del Panadés, Province of Barcelona, Spain; and the

Royal Economic Society of Friends of the Country, to whom the papers were referred in compliance with Section 27 of the
201 Rules now in force, promulgated October 26, 1888, having reported that although according to the records which were saved from the conflagration which occurred here September 28 of last year, and to which I referred in my official letter No. 520 of December 20th of the same year, there was no trademark on file which resembled that of the petitioner, and being in doubt as to whether there is any such trademark resembling that of Mr. Trius among those on file with the Minister of the Interior, therefore and for the purpose of deciding the matter in question, with all due legality and justice, I have the honor to inclose herewith a copy of the label in question, with the request that you refer the same to the Minister of the Interior for a statement as to whether there is any similar trademark among those on file in his department. May God, etc.—

I certify that the foregoing is a true and correct copy of its original on file in this office, and in witness thereof I hereunto set my hand and seal at Manila this 9th day of April, 1907.

[SEAL.] (Signed) M. DE IRIARTE,
Chief of Division.

Documentary Stamp 20 centavos. Executive Bureau, Division of Patents, Copyrights and Trademarks.

202 DEFENDANT'S EXHIBIT "8."

C. 3839.—Copy.—Seal.—Spanish Republic.—Ministry of the Interior.—I, José Morer, Director-General of Public Works, Agriculture, Industry and Commerce, do hereby certify that the firm of Messrs. Van den Bergh & Co., of Antwerp, Belgium, has presented a petition for a trademark to distinguish the products manufactured by them, the description of which is as follows:

A red bronze circle, with a representation of a Bell in the center, in the upper part of which are seen two ears of corn fastened together with a bow ribbon. Immediately under the Bell the words "Extra Superior" are inscribed, and across the label in black ink there appear the words "Van den Bergh & Co." Around the circle and within a smaller circle formed by two curved lines the words "Ginebra de la Compana—Van den Bergh & Co." are inscribed, and on the outside of the said circle and displayed in the same manner the following words appear in Spanish "Para evitar la falsificacion nuestras etiquetas se hallan depositadas y llevan nuestra firma—Amberes."

And the petitioner having satisfactorily shown, in accordance with the provisions of Section 5 of the Treaty of Commerce and Navigation between Spain and Belgium concluded February 12, 1870, and the order of the Government of the Republic of the 14th of August last, that the ownership of the said trademark was granted to
203 the said Van den Bergh & Co. by the Kingdom of Belgium on the 23rd of April, 1863, the present certificate is issued

to the said firm, authorizing the same to use the trademark in question within the Spanish territory and its insular possessions, as provided in the treaty and order hereinbefore referred to. Madrid, December 11, 1873.

[SEAL.] (Signed) J. MORER.

Contents noted:

(Signed) MANUEL G. DE LA LACTRA,
Chief of Bureau.

I certify that the foregoing is a true copy of the original on file in this office.

Manila, April 8, 1907.

(Signed) M. DE IRIARTE,
Chief Division of Archives, Patents, Copyrights, and Trademarks.

Documentary Stamp 20 centavos.

Executive Bureau, Division of Patents, Copyrights, and Trademarks.

[Seal of the Bureau.]

204 DEFENDANT'S EXHIBIT "9."

Government of the Philippine Islands.

(Coat of Arms.)

Executive Bureau.
Division of Archives, Patents, Copyrights, and Trademarks.

To all persons to whom these presents shall come, Greeting:

This is to certify That the annexed is a true copy from the Records of this Division of the Trade-Mark Registered by Van den Bergh & Co. April 25, 1876. Number 3621 for Gin and Whisky.

In testimony whereof I have hereunto set my hand and caused the seal of the Division of Patents, Copyrights and Trade-Marks to be affixed at the City of Manila this 8th day of April in the year of our Lord one thousand nine hundred and seven.

[SEAL.] (Signed) M. DE IRIARTE,
Chief of Division.

Documentary stamp: 20 centavos. Name of Executive Bureau, etc., stamped across its face.

205 2–175.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify That the annexed is a true copy from the record of this office of the trade-mark registered by Van Den Bergh & Co. April 25, 1876, Number 3621, for gin and whisky.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this 4th day of May, in the year of our Lord one thousand nine hundred and of the Independence of the United States of America the one hundred and twenty-fourth.

[SEAL.] C. H. DUELL,
Commissioner of Patents.

(Stamp of $.10 U. S. Cy. Documentary.)

206 *Trade-Mark for Gin and Whisky.*

2–163.

No. 3621.

THE UNITED STATES OF AMERICA:

To all whom it may concern:

This is to certify That by the records of the United States Patent Office it appears that Van den Bergh & Co., of Antwerp, Belgium, did on the Tenth day of March, 1876, deposit in said Office, for registration, a certain Trade-Mark, a copy of which is hereto annexed, and the date of the receipt thereof was duly noted and recorded in words and figures as follows, to wit: "Patent Office, U. S. A., Mar. 10, 1876;" that they deposited therewith a statement, a copy of which is also hereto annexed, and a declaration under the oath of Phillippe Raeymaeckers, a member of said firm to the effect that the party claiming protection for the said Trade-Mark has a right to the use of the same, and that no other person, firm, or corporation has the right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive, and that the description and fac-similes presented for record are true copies of the Trade-mark sought to be protected; and having made the payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents; and having complied with the regulations in such case prescribed by the Commissioner of Patents, and in all other respects complied with the act of
207 Congress in such case made and provided, the said Trade-mark has been duly registered and recorded in the said Patent Office; and protection for the same will remain in force for thirty years from the Twenty fifth day of April, one thousand eight hundred and seventy six, unless sooner terminated in accordance with section 78 of Chapter CCXXX, act of Congress approved July 8, 1870. (Sec. 4937-4948, Rev. Stats.)

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed this Twenty fifth day of April, 1876, and of the Independence of the United States the One-hundredth. Given under my hand in Washington, D. C.

[L. S.] R. H. DUELL,
Commissioner of Patents.

208 United States Patent Office.

Van Den Bergh & Co., of Antwerp, Belgium.
Trade-Mark for Gin and Whisky.

Statement of Trade-Mark No. 3,621, Registered April 25, 1876; Application Filed March 10, 1876.

Specification Describing a Trade-Mark Used by the Firm of Van Den Bergh & Co., of Antwerp, Belgium, for Liquors, such as Gin and Whisky.

The said trade-mark consists of the representation of a bell, as shown in the fac-simile. It is printed or otherwise applied in blue, red, black, or other color, upon the labels or wrappers that are applied to the bottles or other receptacles containing said gin or whisky, and may also be applied as a brand directly to the cases, boxes, &c., that contain a number of such bottles or other receptacles, and it is or may be directly applied in suitable manners to the casks or barrels containing such gin or whisky. The said trade-mark may also be applied, by printing or otherwise, to the pamphlets, advertisements, and other notices which advertise the said gin or whisky to the public.

This trade-mark has been used since the year 1843 by said firm.

VAN DEN BERGH & CO.,
209 By PHIL. RAEYMAECKERS,
A Member of the Firm.

Witnesses:
ANA W. S. ONDT.
F. ALDERNAGHT.

210 DEFENDANT'S EXHIBIT "10."

Government of the Philippine Islands.

(Coat of Arms.)

Executive Bureau, Division of Archives, Patents, Copyrights and Trademarks.

To all persons to whom these presents shall come, Greeting:

This is to certify That the annexed is a true copy from the Records of this Division of the Trade-Mark Registered by Van Den Bergh & Co. November 3rd, 1903, Number 137, for Geneva, Alcohol & Spirits of all kinds and Yeast.

In testimony whereof I have hereunto set my hand and caused the seal of the Division of Patents, Copyrights and Trade-Marks to

be affixed at the City of Manila this 8th day of April in the year of our Lord one thousand nine hundred and seven.

[SEAL.] (Signed) M. DE IRIARTE,
Chief of Division.

Documentary Stamp: 20 centavos. Name of Executive Bureau, etc. stamped across its face.

211 No. 137.

The Government of the Philippine Islands.

(Coat of Arms.)

To all to whom these presents shall come:

This is to Certify That by the records of The Bureau of Patents, Copyrights, and Trade-Marks it appears that Van Den Bergh & Co., of Antwerp, Belgium, did, on the 1st day of October, 1903, deposit in said Bureau for Registration facsimiles of a certain Trade-Mark for Geneva, Alcohol & Spirits of all kinds and Yeast, and the date of the receipt thereof was duly noted and recorded; that on the 1st day of October, 1903, it deposited therewith a statement and a written declaration under the oath of Louis Lysen, Member of the firm, copies of which are hereto annexed; and the said company having made the payment of a fee of Twenty-five Dollars, and complied with the regulations in such cases prescribed by the Chief of Bureau, and in all other respects complied with an Act of United States Philippine Commission approved March 6, 1903, entitled "An Act defining property in Trade-Marks and in Trade-Names and providing for the protection of the same, defining unfair competition and providing remedies against the same, providing registration for Trade-Marks and Trade-Names, and defining the effect to be given to registration under the Spanish Royal Decree of eighteen
212 hundred and eighty-eight relating to the registration of Trade-Marks and the effect to be given to registration under this Act," the said facsimiles, statement, and declaration were duly recorded, and the said Trade-Mark has been duly registered in the said Bureau of Patents, Copyrights, and Trade-Marks this 3rd day of November one thousand nine hundred and three, and protection therefor will remain in force for thirty years from said date unless sooner terminated in accordance with Section 16 of said Act.

In testimony whereof the seal of the Bureau of Patents, Copyrights, and Trade-Marks is hereto affixed this 3rd day of November, 1903.

[SEAL.] (Signed) M. DE IRIARTE,
Chief of Bureau.

213 *Statement.*

To All Whom it May Concern:

Be it known that we Van den Bergh & Co., a firm domiciled in Antwerp, Belgium, and doing business at the Canal des Brasseurs Nos. 31/43 in said city in the capacity of Distillers, Manufacturers of Yeast, Brewers and Maltsters, have adopted for our use a Trade Mark for Geneva, Alcohol, and Spirits of all kinds and Yeast, of which the following is a full, clear and exact specification:

Our Trade Mark consists of a representation of a Bell having depending from the ring a streamer and on either side an ear and leaves of barley.

This Trade Mark has been used continuously in business by us and those from whom we derive title, as early as eighteen hundred and thirty-six (1836) and even before.

VAN DEN BERGH & CO.

Witnesses:

T. COLLART.
R. AUROUSSEAU.

Declaration.

ANTWERP, BELGIUM.

214 Mr. Louis Lysen, being duly sworn, deposes and says that he is a member of the firm, the applicants named in the foregoing statement; that he verily believes that the foregoing statement is true; that he has at this time a right to the use of the Trade Mark therein described; that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the Trade Mark is used in commerce between Belgium and almost all foreign nations of the whole world and particularly with the Philippine Islands; and that the description and fac-similes presented for record truly represent the Trade Mark sought to be registered.

LOUIS LYSEN.

Sworn to before me this 29th day of June 1903.

[CONSULAR SEAL.] HARRY TUCK SHERMAN,
U. S. Deputy Consul General.

DEFENDANT'S EXHIBIT "11."

215 United States Patent Office.

Interference No. 21506.

VAN DEN BERGH & Co.
vs.
BLANKENHEYM & NOLET.

Van den Bergh & Co.'s Record.

Briesen & Knauth, Attorneys for Van den Bergh & Co., 49 Wall Street, New York.

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215–1 United States Patent Office.

Interference No. 21506.

VAN DEN BERGH & Co.
vs.
BLANKENHEYM & NOLET.

Please take notice that we shall proceed to take proofs for final hearing on the part of Van den Bergh & Co., under and in accordance with the statutes in such cases made and provided, and in pursuance of the rules and practice of the Patent Office, before Eugene Eble, a Notary Public, under said statutes and rules, at our office, No. 49 Wall Street, Borough of Manhattan, New York City, on the 17th day of July, 1902, at 11 o'clock in the forenoon.

We desire the evidence to be adduced in this cause to be taken orally.

You are invited to attend and cross-examine the witnesses produced. The examination will be adjourned to such time and place as may be required, without further notice.

Dated New York City, July 1st, 1902.

Very respectfully,

BRIESEN & KNAUTH,
Attorneys for Van den Bergh & Co.

To Messrs. Fred. G. Dieterich & Co., Attorneys for Blankenheym & Nolet.

The following are the names and residences of the witnesses to be examined under the foregoing notice:

215–2 Aurelio Careno, residing at New York City, New York.
Nicholas Chapuis, residing at New York City, New York.

United States Patent Office.

Interference No. 21506.

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

Subject-matter: Registration of the Representation of a Bell for Geneva Gin.

Testimony on Behalf of Van den Bergh & Co., Taken at the Office of Briesen & Knauth, No. 49 Wall Street, New York City, on the 17th Day of July, 1902, Before Eugene Eble, Notary Public, Pursuant to the Annexed Notice of Taking Testimony.

Present:

Hans v. Briesen, Esq., for Van den Bergh & Co.
Vernon M. Dorsey, Esq., for Blankenheym & Nolet.

AURELIO CARRENO, a witness called on behalf of Van den Bergh & Co., being duly sworn, testifies as follows:

1 Q. Please state your name, age, residence and occupation.
A. Aurelio Carreno; age, 63; I live in Bedford Avenue, Brooklyn, 518; occupation, restaurant keeper.
215–3 2 Q. Please state where your restaurant is.
A. I got one at 21 Beaver Street, and the other one at 120 Water Street, New York City.
3 Q. How long have you been at 120 Water Street?
A. Six months.
4 Q. And where were you before then?
A. 21 Beave- Street; I am there yet.
5 Q. How long were you at 21 Beaver Street?
A. About four years and a half.
6 Q. Where were you before you came to 21 Beaver Street?
A. I was in 13 Broadway and at 86 Maiden Lane.
7 Q. Were both of these places restaurants? What was your business at 86 Maiden Lane and 13 Broadway?
A. Restaurant and bar.
8 Q. How long were you at 13 Broadway?
A. Fourteen years.
9 Q. Where were you before you came to 13 Broadway?
A. 86 Maiden Lane was my first place.
10 Q. How long were you at 86 Maiden Lane altogether?
A. From '77 to four or five years ago.
11 Q. Did you keep a restaurant at 86 Maiden Lane under your own name?
A. Yes, sir; A. Carreno.
12 Q. At 13 Broadway?

A. I got a partner there; we opened there in '84 under the name of Braguglia & Carreno.

13 Q. Did you sell gin at all the places you have mentioned?

A. I did.

14 Q. What kind of gin?

A. All kinds; good gin, bad gin and all kinds of gin.

15 Q. From whom did you buy gin?

A. From a good many houses—Nicholas, George A. Nicholas; Emil Schulz; he is dead now.

16 Q. What kind of gin was this?

215–4 A. Bell gin; we called it Geneva de La Campagna or Pachita, a straw, in Spanish.

17 Q. Do you know who made that gin?

A. It is from Holland; Vandebere; some German name like that.

18 Q. How long have you used this Bell gin in your business?

A. Since 1877. In 86 Maiden Lane, the first place I had.

19 Q. Did you drink this gin before you came to 86 Maiden Lane?

Objected to as leading.

A. I did. You better put it down the house where I used to buy it; I mean this kind of gin; Zuricalday & Argimbao, 28 Beaver Street.

20 Q. About how much of the gin or how often was it used in 86 Maiden Lane?

A. I used to use two cases a month; they used to come the same as this (pointing to a bottle). The same bottle. In about '79 or '80 I imported fifty cases at a time from that house through Zuricalday & Argimboa on commission.

21 Q. Is this the bottle that you talked about in your last answer?

A. Yes, sir. At that time I couldn't swear they had this red label; they did have this white label.

The bottle is marked for identification Van den Bergh Bottle. E. E., N. P., July 17, 1902.

22 Q. On this label is written Van den Bergh & Co. Was that name on the bottle that you used to buy?

A. I think; I ain't sure.

23 Q. Was this name Van den Bergh & Co. the name you were trying to say in answer to Q. 17?

A. To the best of my knowledge, it is the same one.

215–5 24 Q. Did you use this Bell gin at 13 Broadway in your business?

A. Yes, sir; also, 21 Beaver Street and the place I have now. The Spaniards all asked for it there.

25 Q. Have you used it right along since 1877 or not?

A. Right along. I always have to keep it because people ask me for it.

26 Q. Have you ever seen any other kind of Bell gin than the one you have talked about?

A. The same bottle and the same label, no.

27 Q. Have you ever heard of the word "Bell" used with any gin except that which came in a bottle like Van den Bergh's bottle?

A. I never saw it; I don't remember.

28 Q. How long have you known, at your own places of business, or at other places, of the use of Bell gin in bottles like Van den Bergh's bottle?

A. I think I am the first one to fetch it here; I think, I don't know. Of course, now there is plenty around. Since '77 in this country; I used to know it in Cuba before.

29 Q. How long have you been in this country?

A. I came here the first time in '57, and go back and forth from here to Havana and Matanzas. I am here since '76 to stay.

30 Q. When you were in Cuba, did you see any of this Van den Bergh Bell gin?

Question objected to as immaterial, inasmuch as the use of the trade-mark outside of the United States can have no effect and determine the rights of the parties to this controversy, and the same objection is made to all other questions asked this witness and answers thereto relating to such foreign use.

A. Yes, in Havana and Matanzas, before I come to this country to stay.

31 Q. Did you ever buy any of this gin from Chapuis?

215–6 A. I am buying it now, and I used to buy it from George Nicholas.

32 Q. Has your business been successful since you first started in?

A. I always pay my bills.

Direct-examination closed.

Cross-examination by Mr. DORSEY:

33 X Q. You said that you used to buy gin from Zuricalday & Argimboa. When did you do this?

A. In 1877 I commenced to buy gin.

34 X Q. You said that you imported fifty cases through Zuricalday & Argimbao in 1879 or '80. Do you know where they got this gin?

A. I don't know; I think it was imported from Antwerp or Havana; a good many cases used to go down to Havana.

35 X Q. Where from?

A. Antwerp.

36 X Q. After importing this fifty cases in '79 or '80, did you get any more Bell gin?

A. Yes; I used to buy from the same firm when I needed a case of two or three, and afterwards from George A. Nicholas.

37 X Q. Have you always had this Bell gin in your restaurants from 1877 to the present time?

A. I did. Now I am buying it from Chapuis.

38 X Q. Then you have been ready during that time to sell it over the bar to anybody who wanted it?

A. Yes, sir.

39 X Q. Have you any distinct recollection now of the label that was on the bottle containing the gin in 1877?

A. Everything that I know is, I think it is the same label there on the bottle (Van den Bergh's bottle); I mean the white label.

40 X Q. Do you know that there was a bell on the label in 1877?

215–7 A. Yes, sir, to the best of my knowledge. I am not sure.

41 X Q. What kind of gin was it that came in these bottles in 1877?

A. As I told you: Holland gin we used to call it.

42 X Q. Is this Bell gin for sale at any other place besides at your bar or restaurant?

A. In the city, yes. I could mention a few places where they sell it. One is in Pearl Street, near Pine; they call it La Chorrera. The other is in Pearl Street, near Maiden Lane; they call it Dos Americos. There is another place on Water Street and Maiden Lane, Schierenbeck & Co. I think there are more places; the American hotels they sell it, too. I know they sell it here at these places.

43 X Q. What do you mean in your answer to Q. 28 in saying that "I think I am the first one to fetch it (Bell gin) here?"

A. Because I never drink it here before. I don't know as somebody else did; I don't know.

44 X Q. So that after your return to the United States, and in the year 1877, you called for this gin and caused it to be imported, if it was not already here?

A. Yes. I had to have it. The customers want it.

45 X Q. You didn't bring a bottle of it in your belongings, in 1876 or '77, when you came to the United States?

A. No.

46 X Q. Have you ever called for Bell gin outside of New York and its vicinity in the United States?

A. I never ask for it in American places.

Redirect examination by Mr. BRIESEN:

47 R. D. Q. Do you remember whether, in 1877, and since that time, the bottles of gin like Van den Bergh's bottle, had the impression in the glass that appears on the bottle?

215–8 A. I can't say about that, and I can't say about the red label. I can say about the white one.

48 R. D. Q. What did you call this gin in '77, or what did your customers call it?

A. Ginebra de la Campana. That is the Spanish for bell, campana.

49 R. D. Q. Was this also called for by the English name?

A. No; they used to call it the Bell gin. The Spaniards called it Ginebra de la Campana. The Americans call it the Bell gin.

Recross-examination by Mr. DORSEY:

50 Re-X Q. You remember there was a white label on the bottle, but you don't remember what was on the white label?

A. That's it. I think this (pointing to the seal on the glass) was on it, but I paid most attention to the white label.

51 Re-X Q. Are there not a number of bottles on the market having seals on the glass?

A. Yes, there are some.

52 Re-X Q. Are there any other bottles on the market except those having the white label which are shaped in the same way?

A. Yes; they are five to the gallon, but these are four to the gallon. They are the same shape, but only smaller. They have Holland gin in them also.

53 Re-X Q. How long have you known these "smaller bottles?"

A. I don't know. I don't remember that.

A. CARRENO.

Sworn to before me this 17th day of July, 1902.

[SEAL.] EUGENE EBLE,
Notary Public, New York County.

215–9 In the United States Patent Office.

Before the Examiner of Interferences.

Interference No. 21,506.

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

It is hereby stipulated by and between counsel for the respective parties in the above-entitled interference that the annexed affidavits of George S. Nicholas, Nicolas Chapuis, Arthur v. Briesen and Hans v. Briesen, may be filed as part of Van den Bergh & Co.'s prima facie proofs, with the full force and effect and as if the witnesses had been called and examined in the usual form by question and answer and subject to the exceptions and objections entered by Blankenheym & Nolet's attorneys, as annexed.

Washington, August 13th, 1902.

FRED. G. DIETERICH.
VERNON M. DORSEY,
Solicitors for Blankenheym & Nolet.

New York, August 12, 1902.

BRIESEN & KNAUTH,
Solicitors and of Counsel for Van den Bergh & Co.

215–10 In the United States Patent Office.

Before the Examiner of Interferences.

Interference No. 21,506.

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

STATE OF NEW YORK,
County of New York, ss:

Nicolas Chapuis, being duly sworn, says: That he is an importer of wines and liquors from Europe and does considerable business therein; that his place of business is at No. 19 South William Street; that he is well acquainted, and has been for a long time, with the gin sold by Van den Bergh & Co., of Antwerp, and that he imports this gin in bottles like the exhibit "Van den Bergh Bottle" from Van den Bergh & Co. directly; that he first bought this kind of gin in a regular business way about seven years ago from George A. Nicholas, who made the previous affidavit; that since then he has continuously sold such gin, but that he has ceased buying it from George A. Nicholas, but by reason of the more extensive business he personally has done in the gin, he has become one of the agents of Van den Bergh & Co. in New York; that the gin which he bought and sold always came in a bottle like "Van den Bergh's Bottle," and that these bottles always bore a seal blown or pressed into the glass, showing the representation of a bell, as well as a label, also bearing the representation of a bell; that he remembers having seen this gin in restaurants in the city of New York
215–11 for a long time prior to his dealing in it, he should say, about for twenty or twenty-one years in the city of New York; that he is unable to swear to any more definite date for reason of the fact that there is nothing to fix such date in his memory, but that ever since he can remember and first became acquainted with the various kinds of gin upon the market, he has always remembered and known the Van den Bergh gin, which was known as the "Bell Gin;" that he used to drink this gin at A. Carreno's, in Maiden Lane, New York City; that he has never known or heard of any other kind of gin which bore the mark of a bell or was called by the name "Bell," but that he has always understood that the bell was a distinctive trade-mark, the property of Van den Bergh & Co.

On being particularly interrogated on behalf of Mr. Vernon M. Dorsey as to what knowledge he has of trade-marks used outside of New York City, he says:

I have not an extensive knowledge of the marks used in the trade outside of New York and its vicinity.

N. CHAPUIS.

Sworn to before me this 12th day of August, 1902.

[SEAL.] EUGENE EBLE,
Notary Public, New York County.

215–12 In the United States Patent Office.

Before the Examiner of Interferences.

Interference No. 21,506.

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

STATE OF NEW YORK,
County of New York, ss:

George S. Nicholas, being duly sworn, says: I am in the business of importing and selling various wines, liquors and cigars and of supplying many of the large hotels, clubs and restaurants in the City of New York and elsewhere with my importations. I have been in this business for more than thirty years. I used to be in partnership with J. F. and A. B. Purdy, under the name of Purdy & Nicholas, and we did business at No. 43 Beaver Street, in the City of New York, where I still continue to do business under my own name. I am very well acquainted with the Van den Bergh gin. I import it now and have imported it continuously since the first importation thereof. This gin comes in a bottle like exhibit "Van den Bergh Bottle" and each bottle has always, since my recollection, been provided with a white label bearing the representation of a bell. I don't remember clearly whether the seal was always blown into the glass or not. This gin is known as "Bell Gin" and has been so known since I can recollect. I am unable to testify when I first imported this kind of gin, but in looking over some of our old catalogues I find one which was published in 1885, in
215–13 which "Van den Bergh Bell Gin" is advertised for sale by Purdy & Nicholas. From this document I am sufficiently able to refresh my memory to know that I have imported the "Van den Bergh Bell Gin" in bottles as described since 1885 and continuously without interruption thereafter. I am under the impression that I imported the gin for a number of years prior to 1885. I should say, from memory, since about 1881, but I cannot swear positively to any particular date previous to 1885.

I do a very large business and I have been compelled, in order to gain room, to destroy my books more than ten years old, and, therefore, cannot verify the exact date of my first importation. I have sold this "Bell Gin" in bottles as described to a great number of people in New York, but most particularly to Spaniards. I have sold some in the past to Aurelio Carreno, but I cannot fix the exact dates of such sales, as my books have been destroyed.

I have never known or heard of any other kind of gin which bore the mark of a bell or was called by the name "Bell," but have always understood that the bell was a distinctive trade-mark, the property of Van den Bergh & Co.

On being particularly interrogated on behalf of Mr. Vernon M. Dorsey as to what knowledge he has of trade-marks used outside New York City, he states:

I ship all over the United States. I think we have caused this "Bell" gin to be shipped to Florida; that is, direct from Antwerp to Florida. I don't know how to answer the question. Of course, I don't know all the marks of goods in which I don't deal.

GEORGE S. NICHOLAS.

Sworn to before me this 12th day of August, 1902.

[SEAL.] EUGENE EBLE,
Notary Public, New York County.

215–14 United States Patent Office.

Before the Examiner of Interferences.

Interference No. 21,506.

VAN DEN BERGH & Co.
vs.
BLANKENHEYM & NOLET.

STATE OF NEW YORK,
County of New York, ss:

Hans v. Briesen, being duly sworn, says that he is an attorney and counsellor-at-law, in the office of Briesen & Knauth, attorneys for Van den Bergh, herein.

I have had personal charge of this Interference from the beginning and have conducted the proceedings up to the present time. In the course of the preparation of these proofs I have received information from Van den Bergh & Co., in Belgium, to the effect that so far as their books show, the following list of purchasers have bought their Geneva or gin in the State of New York during and since the year set opposite their names:

1852.—Francia Gomez & Co.
1853.—J. C. C. Lomelino & Co.
1853.—Adolphe Oechs.
1855.—Sarazin & Dufais.
1856.—Kahl & Gorissen.
1860.—Alexandre Nilet.
1866.—Ferd. Herz & Co.
1867.—Christian Bors.
1867.—Reynes Brothers & Co.
1871.—Louis Benjamin.
1875.—Baermann & Co.

1876.—Hennings & Co.
215–15 1878.—Lelienthal Brothers & Stern.
1877.—Renauld Francois & Co.
1879.—P. Mina.

I have not given consideration to the names of purchasers for other places than New York State, although the list contains such other names, especially Galveston, New Orleans, Philadelphia, San Francisco and Florida, for the reason that investigations in such distant localities would entail too much expense. The names which I have above mentioned I have carefully investigated, particularly in the annual directories, in order to ascertain what members of the various firms might have survived, and I find that no one of the firms mentioned, or of the individuals mentioned, or any member of any of the firms is in existence except Mr. Renauld, who, I was informed at his office, 95 Broad Street, New York City, has become very wealthy and now permanently resides in France and has no intention of returning to the United States.

To illustrate how this search which I have made was carried on, I will cite the case of Pietro Mina, of 23 William Street, New York. I traced him through the directory until 1886, when the directory showed that his business was changed to P. Mina & Co. The co-partnership directory added the information that P. Mina & Co. consisted of P. Mina and Ciro Monte.

Then tracing both Monte and Mina, I found that both disappeared from the directories about two years later. This indicated to me that they had either removed from New York or, more probably, that they had died.

HANS v. BRIESEN.

Sworn to before me this 12th day of August, 1902.

[SEAL.] EUGENE EBLE,
Notary Public, New York County.

215–16 United States Patent Office.

Before the Examiner of Interferences.

In re Interference No. 21,506.

VAN DEN BERGH & Co.
vs.
BLANKENHEYM & NOLET.

STATE OF NEW YORK,
County of New York, ss:

Arthur v. Briesen, being duly sworn, says that he is one of the attorneys for Van den Bergh & Co., involved in the above entitled interference; that he was the attorney who prosecuted the application for trade-mark, which was registered in 1876 and was No. 3,621. That Van den Bergh & Co., to whom Certificate No. 3,621

issued, is the same Van den Bergh & Co. involved in the above entitled interference.

ARTHUR v. BRIESEN.

Sworn to before me this 14th day of August, 1902.

[SEAL.] EUGENE EBLE,
Notary Public, New York County.

Counsel for Van den Bergh & Co. now offers in evidence Trademark Certificate No. 3,621 of 1876 for the representation of a bell for gin and whiskey and issued to Van den Bergh & Co.

It is stipulated that in lieu of the original or a certified copy thereof, a patent office copy may be substituted with the same force and effect as if the original were marked in evidence.

215–17 Counsel for Van den Bergh & Co. also offers in evidence the catalogue produced by the witness Nicholas and the same is marked "Nicholas Catalogue, E. E., Sp. Exr., Aug. 12, 1902."

Subject to the testimony to be taken abroad, Van den Bergh & Co. rest their prima facie proofs.

United States Patent Office.

Interference No. 21,506.

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

STATE OF NEW YORK,
County of New York, ss.:

I, Eugene Eble, a Notary Public in and for the County of New York and State of New York, do hereby certify that the foregoing deposition of Aurelio Carreno was taken on behalf of Van den Bergh & Co. in pursuance of the notice hereto annexed, before me, at the office of Briesen & Knauth, No. 49 Wall Street, in the City of New York, in said county, on the 17th day of July, 1902, and that the said witness was by me duly sworn before the commencement of this testimony; that the testimony of said witness was written out by Miss Victoria Baeder upon the typewriter in my presence; that the opposing party was represented by counsel during the taking of said testimony; that said testimony was taken at 49 Wall
215–18 Street, New York, on the day aforesaid; that the testimony of said witness was read to him before the witness signed the same, and that the deposition was signed in my presence.

I further certify that the affidavits of Nicolas Chapuis, George S. Nicholas and Hans. v. Briesen were signed in my presence and sworn to before me the 12th day of August, 1902; that the affidavit of Arthur v. Briesen was signed in my presence and sworn to before

ne on the 14th day of August, 1902, and that these affidavits, forming part of the record herein, are embodied herein in accordance with a stipulation hereto annexed.

I further certify that the stipulation hereto annexed relating to the exhibit "Trade-mark registration Certificate No. 3,621 of 1876" was made by consent of counsel for the parties hereto. I further certify that I have marked with my name the exhibits herein introduced; further, that I am not connected by blood or marriage with either of said parties nor interested directly or indirectly in this controversy.

In testimony whereof, I have hereunto affixed my hand and set my seal of office this 14th day of August, 1902.

[SEAL.] EUGENE EBLE,
Notary Public, New York County.

Direct Interrogatories Propounded to the Witnesses Paul Raeymaeckers and Theodore Collart, in Behalf of Van den Bergh & Co.

Interrogatory 1. Please state your name, residence and occupation.

Interrogatory 2. Please state what connection you have or have had with the firm of Van den Bergh & Co., of Antwerp, and whether the said firm is the junior party to this interference.

215–19 Interrogatory 3. Please state what is the business of that firm and for how long such business has been carried on, so far as you know.

Interrogatory 4. Please state what is the trade-mark of the said firm or gin, and specify if the same trade-mark has been used on other kinds of goods.

Interrogatory 5. Please state how long the said trade-mark "The Bell" has been used by the said firm in Belgium, so far as you can find out from the books of the firm, or from ancient records, or in any other manner.

Interrogatory 6. Please state whether or not any other firm, individual or corporation has the right to use the said trade-mark "The Bell" for gin and other distilled liquors.

Interrogatory 7. Please state what information you have as to the exportation of "Bell" gin from Belgium to the United States by the firm of Van den Bergh & Co.

Interrogatory 8. Mention all of the names of purchasers or importers of the said "Bell" gin in the United States, together with their residences and the years during which Van den Bergh & Co. first began to export it to them.

Interrogatory 9. Please state, if you can, whether any of these exportations are confirmed by consular invoices, so far as you have ascertained.

Interrogatory 10. Please describe the bottle and label in which the firm of Van den Bergh shipped their "Bell" gin and other liquors bearing the trade-mark of "The Bell" to the United States; and, if you can, annex a copy of such label to this deposition.

Interrogatory 11. Please state what evidence you have that such bottles marked with the said trade-mark were ever received in the United States, and state whether your books show if the goods were paid for.

215–20 Interrogatory 12. Please state when Van den Bergh & Co. first adopted the said trade-mark of "The Bell" and whether or not it had been continuously in use by their predecessors for a long period of time; and, if so, please state what information you have as to the predecessors of Van den Bergh & Co. and the use of the trade-mark "The Bell" by them on gin and other distilled products.

Interrogatory 13. Please state whether or not since the said trade-mark of "The Bell" has been adopted by Van den Bergh & Co. and its predecessors, its use has ever been interrupted, suspended, discontinued or abandoned, particularly with regard to the United States of America.

Interrogatory 14. Please state whether or not the exportation by Van den Bergh & Co. of gin bearing the "Bell" trade-mark to the United States has been continuous since its inception, and whether or not it is now and has for a number of years past been a trade of considerable magnitude and value to Van den Bergh & Co., and whether or not said exportation has been discontinued or abandoned for any time since it first began.

Interrogatory 15. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

215–21 In the United States Patent Office.

Before the Examiner of Interferences.

Interference No. 21,506.

In Re Interference

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

Objections to the Proposed Direct Interrogatories to be Propounded to Paul Raemaeckers and Theodore Collart, on Behalf of Van den Bergh &Co.

Blankenheym & Nolet object to the following interrogatories for the reasons set forth.

Interrogatory 5 is objected to for the reason that it is immaterial and irrelevant in that it calls for an answer as to the use of the mark in controversy in Belgium and not in the United States.

And said interrogatory is further objected to as calling for hearsay evidence, and for the conclusions reached by the witness from an inspection of the books or records referred to.

Interrogatory 6 is objected to as being immaterial and irrelevant in that it calls for a conclusion of the witness as to a matter of law.

Interrogatory 12 is objected to as immaterial and irrelevant for the reason that the date of adoption by Van den Bergh & Co., a non-resident, of the mark in question, and a continuity of use thereof in Belgium, are not germane to the issue.

215–22 In the United States Patent Office.

Before the Examiner of Interferences.

Interference No. 21,506.

In Re Interference

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

Trade-mark for Cordials and Spirits.

Cross-interrogatories Propounded to the Witnesses Paul Raeymaeckers and Theodore Collart in Behalf of Blankenheym & Nolet.

Cross-interrogatory 16. Please state where the gin sold under the trade-mark referred to in your answer to Interrogatory 3 is made; and the substance or materials used in the manufacture of said gin. If said gin is made in more than one place, and if different kinds thereof are made, please answer this question by reference to each place of manufacture, and to each kind.

Cross-interrogatory 17. Please produce and have the commissioner copy and affix to your answer the pages of such books or ancient records as enable you to answer Interrogatory 5.

Cross-interrogatory 18. State where you derive the information upon which you base your answer to Interrogatory 7.

Cross-interrogatory 19. State where you derive the information upon which you base your answer to Interrogatory 8.

Cross-interrogatory 20. State where Van den Bergh & Co. or their predecessors used the trade-mark "The Bell" at the times named by you in answer to Interrogatory 12, and upon
215–23 what products it was used at such times. Also state from what you derive your knowledge of the adoption of the trade-mark "The Bell" by Van den Bergh & Co.

Cross-interrogatory 21. Did not the firm of Van den Bergh & Co., in the years 1881 and 1882, bring suit before the Recorder of the Court of Justice at Rotterdam, The Netherlands, to cancel the registration granted in The Netherlands to Blankenheym & Nolet of the trade-mark "The Bell" for gin, and did not the Court, after

a hearing of the parties in that action, hold that Blankenheym & Nolet had used "Bell" as a trade-mark for gin as early as 1840, and require, by an order dated the 12th of April, 1882, Van den Bergh & Co. to prove a use prior to 1840, and have Van den Bergh & Co. taken any steps since that time to prove the use thus required by the Court?

215–24 In the United States Patent Office.

Before the Examiner of Interferences.

Interference No. 21,506.

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

Objections to the Cross-interrogatories Propounded to the Witness Theodore Collart.

Cross-interrogatory 16 is objected to as immaterial and irrelevant and as seeking to go into the trade secrets of Van den Bergh & Co.

Cross-interrogatory 21 is objected to as immaterial, irrelevant and incompetent, as calling for secondary evidence, as misstatement of facts, and, therefore, as misleading as new matter, and, therefore, as not cross-examination.

Objections to cross-interrogatories propounded to the witness, Paul Raymaekers.

Cross-questions 16 and 21 objected to for the same reasons as cross-questions 16 and 21, propounded to the witness, Theodore Collart.

BRIESEN & KNAUTH.
Attorneys for Van den Bergh & Co.

Dated New York, October —, 1902.

215–25 Before the Examiner of Interferences.

Interference No. 21,506.

In the Matter of the Interference of

VAN DEN BERGH & CO.
vs.
BLANKENHEYM & NOLET.

THEODORE COLLART, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by Messrs. Briesen & Knauth, counsel for Van den Bergh & Co., as follows, viz:

To the first interrogatory he saith:

Theodore Collart; domiciled and residing at Bouchout, Lierre. Bookkeeper and examiner of claims.

To the second interrogatory he saith:

I have been the bookkeeper of the firm of Van den Bergh & Co., specially charged with general supervision and with the examination of claims. The firm of Van den Bergh & Co. is, in fact, the junior party to this interference.

To the third interrogatory he saith:

Messrs. Van den Bergh & Co. are manufacturers of gin distilled from grain and of divers alcoholic liquors; also manufacturers of yeast, besides being brewers and malsters. They are also engaged in general trade. The original acts and other documents prove that they began the manufacture of gin from grain the 16th of December, 1843; succeeding to their predecessors, Janssens & Van Pee, who likewise made gin from grain from 1836 to 1843.

To the fourth interrogatory he saith:

The sole and unique trade-mark and label of the said firm of Van den Bergh & Co., for their gin is "La Cloche" (The Bell)
215–26 (La Campana). The label bears across its face the signature, which has not varied since 1843. This trade-mark serves likewise for all the other products of the house, but, in addition to the design of the bell, the label bears the name of the product, such as yeast, beer, etc.

To the fifth interrogatory he saith:

Messrs. Van den Bergh & Co., have used the "Bell" trade-mark and label since December 15th, 1843. The books and divers documents prove this. The documents and certificates likewise prove the use of the same trade-mark by their predecessors, Janssens & Van Pee, from 1836 to 1843. Furthermore, these authentic and ancient documents prove that the house bears the sign "La Cloche" (The Bell) since the year 1631, and that it was sold in the year XIII (1804) of the French Republic as "Brande-vinnerie" (Distillery).

To the sixth interrogatory he saith:

No other individual or corporation has the right to use the "Bell" trade-mark for its gin, alcohol or any other distilled product.

To the seventh interrogatory he saith:

By tradition, public notoriety and the verbal testimony of old employés of the house, I learned that the exportation of the firm of Van den Bergh & Co. to the United States, as well as to all other countries, have been made for a very long time. Furthermore, having begun my commercial career in 1855, and having entered an import and export house in 1857, I was able to see for myself that exportations were made on a large scale by Van den Bergh & Co. The books and documents, which have been preserved and are at my disposal, prove that the firm at the very outset, i. e., in the beginning of 1844, exported its gin distilled from grain, to the United States of America and divers other countries. The firm
215–27 sold also to merchants at Antwerp and other places for exportation to the United States as well as to ship owners and the leading ship chandlers of Antwerp.

The affidavit of Mr. Philippe Raeymaeckers (father), signed on December 31st, 1875, before the United States Consul at Antwerp,

has furthermore proved to me the great length of time during which these exportations have been made to the United States.

Books and documents showing the exportation to the United States of America:

An account book of 1844, written by the hand of Mr. Philippe Raeymaeckers, who is still a member of the firm of Van den Bergh & Co., and who must remember perfectly well all that occurred in 1843-1844, which shows on April 23d, a consignment to B. A. Cobb Brothers, at Galveston (Texas), of 50 cases of gin, per Belgian vessel "Jeanette," and on the 26th of April, 1844, the delivery on board of same vessel of three barrels of gin for Galveston (Texas), for account of an Antwerp house.

An account of sale from A. Maquinay, at Galveston (Texas), on December 25th, 1845, for 150 cases gin ex. vessel "Albertine," of Antwerp, with an attestation to the effect that the bottles, demi-johns and jugs bore the "Bell" trade-mark.

Two letters from Vor. Maignan and F. Laborde, at New Orleans, the first, of February 6th, 1868, bearing the post-mark of New Orleans, of February 6th, 1868; the latter, of the 14th of April, 1868, bearing the post-mark of New York, April 18, 1868. In 1868, according to the ledger, a consignment of gin by vessel "Friedchen" was addressed to them. These business relations lasted until 1874. In 1874 they continued with Vor. Maignan, their successors, and afterwards with Paul Gelpi & Brother, who, in turn, ceded
215–28 these relations in 1898, to Paul Gelpi & Sons, at New Orleans.

The records of shipments show also these direct and uninterrupted relations with New Orleans, from 1868 to 1901; the records of accounts current show the same since 1885; the consular invoices kept on file at the United States Consulate General at Antwerp, confirm all these shipments. In my reply to the eighth interrogatory I shall refer to the commercial relations with New York, Philadelphia, San Francisco, Chicago, Key West and Tampa, which further corroborate the answer to this interrogatory.

To the eighth interrogatory he saith:

1844—B. A. Cobb & Brother, at Galveston (Texas).

1845—A. Maquinay, at Galveston (Texas).

A great fire, on April 30th, 1870, completely destroyed the "Bell" works, as also the books, documents and letters kept on the upper floors. Only those cited in these interrogatories and deposited in a vault in the offices on the ground floor were saved. In consequence of the above the information for the period from 1845 to 1870, is incomplete as regards the American buyers, whose names were all included in a single account, entitled "Divers Debtors," thus rendering it impossible to find the names of those who did not continue as customers of Van den Bergh & Co. However, between 1845 and 1870, relations with the United States continued regularly and without interruption. In the fire of 1870, the gin situated in the greater portion of the underground cisterns was saved, and while waiting for the reconstruction of those works, Van den Bergh & Co. continued the manufacture of their gin in works at Roulers (Belgian Flanders)

and in other works at Anderlecht (Brabant), both of which were hired. They were thus able to continue delivering to their 215–29 customers at home and abroad, and in November of the same year, their own works were rebuilt and running.

Exportations for Havana increased steadily from 1845 to 1870, as was the case for all other countries. This amply proves that exportations to the United States of America also steadily increased during that period.

1868—Vor. Maignan & F. Laborde, New Orleans.
1874—Vor. Maignan (their successor), New Orleans.
1877—Paul Gelpi & Brother, New Orleans.
1877—Aug. Marino, Philadelphia.
1882—Purdy & Nicholas, New York.
1882—Zuricalday & Arguimbay, New York.
1883—S. L. Jones & Co., San Francisco.
1885—Franco Hollander & Co., San Francisco.
1885—Aug. Merino & Co. (successors to Aug. Merino), Philadelphia.
1886—J. F. Fontanel, Chicago.
1887—Thurber, Whyland & Co., New York.
1887—Louis E. Albin, San Francisco.
1888—A. Laviada, New York.
1888—G. S. Nicholas (suc. to Zuricaldy & Arguimbau), New York.
1889—Wichmann & Ludgen, San Francisco.
1895—Baldwin Brothers & Co., New York.
1898—Paul Gelpi & Sons (suc. to Paul Gelpi & Brothers), New Orleans.
1900—N. Chapuis, New York.

All these shipments are confirmed by documents (since 1868) on file in the archives of the United States Consulate General at Antwerp.

From 1888 to 1901, many large shipments were made to Key West and Tampa (Florida). The latter shipments by Van den Bergh & Co. were consigned to Messrs. Dussaq & Co., at Havana, and the gin was stored by them in the customs warehouse at Havana on account of the high Cuban duty. This gin was entirely 215–30 sold for Key West and Tampa. The accounts show the place of sale, but not the names of the purchasers. I only know one, viz.: The Florida Brewing Company at Tampa. The shipments were accompanied by documents drawn up before the United States Consul at Havana. Messrs. Dussaq & Co. can produce his attestation.

To the ninth interrogatory he saith:

All these shipments of "Bell" gin since 1868 are proven by consular invoices now on file in the archives of the United States Consulate General at Antwerp. I have assured myself on this fact.

To the tenth interrogatory he saith:

Shipments to the United States are made in square bottles, larger at the top than bottom and stamped in the glass itself on the shoulder thereof is the "Bell," over the face of which is inscribed "Van den

Bergh & Co." These bottles are of three different sizes. The largest has, in the first instance, a flat top to the neck and is closed by a simple cork; in the second instance, the top of the neck is conical and the cork is covered by a white capsule, in which is reproduced the stamp referred to above. For the two smaller sizes the neck is conical and invariably covered with a white capsule. The label for the United States is invariably the one appended (see Exhibit A). The ground is white, the letter and the bell are in red bronze. The Spanish text, "Ginebra de la Campana—Van den Bergh & Co.," is in the outer circle. The inner circle contains the bell with a ribbon and ears of grain, and outside the outer circle are the words, "Para evitar la falsificacion nuestras etiquetas se se hallan depositadas y llevan nuestra firma," and beneath, the words "Amberes." The label bears across its face in black, the signature, Van den Bergh & Co., which has never changed since 1843.

215–31 To the eleventh interrogatory he saith:

Orders have been given to the "Bell" distillery for the "Bell" brand, each bottle to be stamped with the "Bell" label, and these orders having always been carefully executed, and the bottles in cases placed on board with this label it is abundantly proven that importations into the United States were always made solely with this label. Furthermore, there never have been any claims for missing labels on the bottles and these labels, proving the origin, determined thereby the value of the goods. Messrs. Van den Bergh & Co. have always been in relations with solvent business houses and, according to the books, all the accounts have been regularly paid. No lawsuit has ever been ins-ituted against a buyer and I can certify that there have never been any bad debtors upon the books of the house since 1872, the year which I entered the employ of Van den Bergh & Co., and at the time it had no affairs in litigation.

To the twelfth interrogatory he saith:

Van den Bergh & Co. in 1843, simply continued the exclusive use of the trade-mark "The Bell," of which they had become owners, also of the "Bell" distillery. Their predecessors, Janssen and Van Pee, who were likewise distillers of gin, used exclusively the same and unique trade-mark from 1836 to 1843, as is proven by the old documents and certificates, but only for gin distilled from grain. They manufactured no other product.

In support of the above statement I submit a document, entitled "A Deed of Notoriety," marked Exhibit Number 1, from which I call attention to the extracts quoted as follows, viz.:

5th Page—That since the year 1804, until this day, without any interruption, the proprietors and occupants of the said
215–32 estate, situated in Antwerp Canal des Brasseurs, bearing formerly the number 2383, and at present 31 to 35, have not ceased to exercise the industry of brewing and of distilling of gin under the trade-mark "The Bell," and that during that lapse of time no other similar establishment bearing the same trade-mark has existed in Antwerp. That, particularly, in a deed of sale of the estate in question, made before the notary, Jean Martin Schepens, residing then in Antwerp, on the 26th day of the Vendemmaire of

the 13th of the French Republic (October 20, 1804), duly registered in Antwerp, on the 8th day of Brumaire of the same year, volume 42, folio 4, recto cases 1, 2 and 3, it is said that Mr. Antoine Leemans brewer, and his spouse, Jeanne Laughmans, both living in Antwerp, have sold to Marie Catherine Leemens, spouse of Philippe Van Pee, and partners in Antwerp, a house, brewery aand distillery of gin, "brandevinnerie," named "The Bell," situated in Antwerp Canal des Brassen-s first section, number 2385, with all the utensils for the working.

9th Page—The aforesaid Pierre Jan Henri Janssen and Van Pee remained the only partners who have continued their industry until eighteen hundred and forty-three, the time at which the firm, Van den Bergh & Co., became the proprietors of the said steam distillery and brewery, "The Bell," with machines, kettles, distilling apparatus, tanks and all the necessary materials for working, according to a deed of sale made before the notary in Antwerp Hanegraef, on the 15th December, 1843, registered and mentioned above, which firm, Van den Bergh & Co., still owns to-day the said brewery and distillery bearing the sign, the "Bell."

In support of their statements, declarations and affirmations, persons appearing have exhibited before us the following documents returned to them afterwards:

215–33 I. An invoice dated at Antwerp, in the year 1843, for delivery of gin made by Janssen & Van Pee, to B. Claessens, in Antwerp, under the dates of July 2d and 7th August, 1843. This invoice bears on the margin as a letter-head advertisement the engraving of a bell (see Exhibit H, photo I).

II. An invoice of Janssen & Van Pee (see Exhibit marked H, photo I).

III. An invoice dated Antwerp, August 5th, 1844, for delivery by Van den Bergh & Co., to H. Claessens, of Antwerp of a barel of bitters. This invoice bears the figure of a bell.

IV. An invoice of Van den Bergh & Co., of the 9th of August, 1844, for one pipe of gin.

V. An invoice of Van den Bergh & Co., of the 28th of January, 1845, for two pipes of gin.

VI. An invoice of Van den Bergh & Co., of the 3d of February, 1845, for two casks of gin (see Exhibit number H, photo 2).

VII. An account of sale, written in English, dated London, October 21st, 1845 signed Gray MacFarlan, for 10 cases of "Bell" gin of Van den Bergh & Co., Antwerp.

VIII. An account of sale dated from Galveston, Texas, December 2d, 1845, for a lot of gin bearing the label "The Bell" of Van den Bergh & Co., Antwerp.

IX. An account of sale, dated Constantinople, May 10th, 1848, for 100 baskets of "Bell" gin of Van den Bergh & Co., Antwerp.

X. An account of sale, dated Havana, June 10th, 1849, for 172 demijohns, 28 cases and 50 cases "Bell" gin of Van den Bergh & Co., Antwerp.

XI. A declaration in the Flemish language, made by Messrs. Jean Gregoire and William Gregoire, Abts., dealers in yeast, at Antwerp,

stating that since 1841 they delivered to Messrs. Janssen & Van Pee, the yeast necessary for the fermentation of the flour in their
215–34 distillery, the "Bell," and afterwards to their immediate succession, Van den Bergh & Co., and that they even sold their gin under the "Bell" label since 1841. This declaration is dated December 2d, 1881.

XII. A declaration in the Flemish language of Mr. J. Chabot, stating that the distillery which Van den Bergh & Co. took over in December, 1843, from Janssen & Van Pee, was always known before that time and since that time by the name of "The Bell," and that the gin from that distillery has always been sold under the "Bell" label. This declaration was signed and dated Antwerp, the 2d December, 1881.

XIII. A letter dated at Rotterdam, January 6th, 1882, from Messrs. J. F. Hoffman & Sons, manufacturers of bottles, addressed to Van den Bergh & Co., at Antwerp, and stating that, according to the information and researches obtained and made by them, they manufactured the bottles of Van den Bergh & Co., with the mark "Bell" as far back as 1836, and perhaps still earlier.

XIV. A declaration dated February 20th, 1899, and signed by Mr. Louis Meeus-Van Beeth, distiller, at Antwerpt, saying that he knows of his own knowledge that the "Bell" distillery was purchased in 1843, from Janssen & Van Pee by Van den Bergh & Co., who since that time have continued the exploitation of the distillery without interruption. This declaration states, furthermore, that Janssen & Van Pee exploited the said distillery long before 1836 and "The Bell" sign was the distinguishing mark of their works, as well as of all their products.

XV. A letter dated Gosselies, July 4th, 1899, addressed by J. De Falque-Allard, secretary-treasurer of the State Intermediary School, to Van den Bergh & Co., at Antwerp, stating that the firm
215–35 of Allard has bought from them gin for the past seventy years without interruption. The following is the conclusion of the Act of Notoriety, viz.: That it results, in consequence of the affirmation of those who have appeared and from the documents produced and cited in the present act of notoriety, executed before me, Jean Teurlings, notary, residing at Antwerp, the undersigned on September 18th, 1898, and registered:

That the property belonging at present to the firm of Van den Bergh & Co., established at Antwerp Canal des Brasseurs, 31 to 35, and also Canal des Vieux Lions, and which serves as a brewery and distillery of gin, liquors, cordials, bitters, neutral alcohol or adulterated malt, yeast, ale and beers of divers kinds bearing the sign "The Bell," operated without interruption as a brewery prior to the 12th of March, 1561, period when the city of Antwerp become the owners; and as a brewery and distillery prior to the 22d of October, 1804, date when Marie Catherine Leemans, wife of Philippe Van Pee and partners, purchased it; and that the "Bell" was used as the sign of the works and as the distinguishing brand of the products manufacturned therein by Janssen & Van Pee long before the year 1836, and by the firm of Van den Bergh & Co., at the time when they took

over the exploitation of the same works of the said Janssen & Van Pee; and finally that all the accounts of sale and invoices used by Janssen & Van Pee, as well as by the firm of Van den Bergh & Co., bear the same letter-head advertisement with the engraved figure of a "Bell," and the products are generally known under the distinguishing trade-mark.

Done at Antwerp, in duplicate, on the above-mentioned date in the presence of Florent Dollez and Hippolyte Beufkins, both residing at Antwerp, witnesses to the act, who, after hearing it
215–36 read to all present, signed with them and with me, notary. (Signed) Paul Raeymaeckers, T. Collart, Fl. Dollez, B. Beufken and Jean Teurlings, Not.

Registered at Antwerp (South), the 25th day of September, 1901, vol. 125, folio 31, case 4, seven roles and without foot-notes. Received two francs, 40 centimes. The cashier, De Backer. (Signed) Jean Teurlings.

(Seal of the Tribunal). Seen by me, President of the Tribunal of First Instance, sitting at Antwerp, for the legalization of the signature of Jean Teurlings, described as above. (Signed) L. Van Cutsem.

(Seal of the Consul General). U. S. Consulate General, Antwerp, October 8th, 1901. Seen for legalization of the signature of Mr. L. Van Cutsem, President of the Court of First Instance, and the seal of his office. (Signed) George F. Lincoln, U. S. Consul General.

I further submit an affidavit of Mr. Philippe Raeymaeckers, made before the Consul of the United States, at Antwerp, December 31st, 1875, and recalled by him on the 22d of November, in a further affidavit made before the United States Consul General, at Antwerp, so categorical in its terms that it must dissipate all doubt (see Exhibit number VII).

The certificate of the 20th of February, 1899, of Mr. Louis Meeus-Van Reeth, mentioned in Exhibit number I, made after 1881 and 1882, is conclusive, the more so as it emanates from an old distiller and a competitor, likewise the invoices of the predecessors and the affidavit of Mr. Philippe Raeymaeckers, before the United States Consul at Antwerp, of December 31st, 1875, strengthened by the further affidavit of November 22d, 1902.

To the thirteenth interrogatory he saith:

No.

215–37 To the fourteenth interrogatory he saith:

Since 1843, Van den Bergh & Co.'s shipments of their "Bell" gin to the United States have always been important, both as to quantity and value. This brand has constantly been in favor and their commercial relations with the United States have never discontinued nor been abandoned, inasmuch as the American buyers, in calling for the "Bell" brand, expected to receive the veritable gin distilled from grain at Antwerp by Van den Bergh & Co., as is shown by the certificate given by the numerous foreign houses referred to in reply to interrogatory number fifteen. The certificate of Messrs. J. Meeus and of Bal & Co., both distillers at Antwerp, and

consequently competitors of Van den Bergh & Co., is a positive proof. (See photograph, sheet number II, Exhibit number II.)

To the fifteenth interrogatory he saith:

The following is what I have to submit in favor of Messrs. Van den Bergh & Co., viz.:

As before stated, they have their own unique trade-mark and label, "The Bell" ("La Cloche" or "La Campana"). (See Exhibit II, photo sheet number VII.) They challenge any one to allege or prove that they or their predecessors, Janssen & Van Pee, ever used any other mark from 1836 to 1901. I know personally that more than once Van den Bergh & Co. have refused orders from abroad, the buyers having demanded different labels.

Dutch System—This system of using trade-marks differs materially from our own. Instead of a sole mark, the Dutch distillers use whatever marks are called for by their buyers, which statement I prove as follows:

A. Houtman & Co., distillers at Delfthaven, wrote to Van den Bergh & Co., under date of 23d December, 1863. (See Exhibit 2, photo number V.)

215-38 "We have 67 marks, which have been sent us by several houses of both London and New York."

J. B. Henkes, distiller, of Delfthaven, wrote on April 7th, 1863: "In our distillery we do not confine ourselves to one but use several brands." (See Exhibit 2, photo number VI.)

W. M. Reepmaker, attorney-at-law, of Rotterdam, wrote on the 17th of April, 1887:

"With us, distillers are not of your opinion, which, however, is the correct one, that one should have but one brand, and Messrs. Blankenheym & Nolet, like the others (save Mr. Van Hobokem), stamp their products with any brand asked for without making any difference in their quality, etc. As to the 'Key' brand, this is the sign of their distillery, just as the "Bell" is the signs of yours, and they should only use this mark." (Signed) W. M. Reepmaker, attorney.

Blankenheym & Nolet have the "Key" brand (see Exhibit 2, Photo VIII), but they follow the Dutch custom. In 1882 they had 35 different marks, of which I submit the list (Exhibit 4). Among others, there is the "Bell," registered by them in Holland, June 28th, 1881. (Exhibit 2, photo number VIII.) The first Dutch law regarding trade-mark is dated May the 25th, 1880, and as soon as it was possible, Van den Bergh & Co. registered their trade-mark "La Cloche," "The Bell," "La Campana," at Amsterdam, the 7th of February, 1881, numbers 49, 50 and 51, therefore, before Blankenheym & Nolet and in the latter's own country.

Again the marks were registered at Amsterdam, the 5th day of September, 1881, numbers 39, 40 and 41. These marks were again registered at The Hague, the 2d of October, 1900, num-

215-39 bers 14,923, 14,924 and 14,925, without any opposition on the part of Blankenheym & Nolet, either in 1881 or in 1900, opposition which certainly would have been made in their own country if they really had prior rights to those of Van den

Bergh & Co. On the other hand, Van den Bergh & Co. caused thirteen different trade-marks bearing a bell used by seven different Dutch distillers to be erased from the records. These thirteen marks had been filed separately in 1881. (Exhibit 17 and Exhibit 2, photos IX to XII.) The exclusive property of Van den Bergh & Co. in the "Bell" trade-mark had to be recognized by the seven distillers and their thirteen marks, imitating the "Bell," have disappeared. The signature of Van den Bergh & Co. on the labels has always been the same as regards the handwriting, since 1843. On the other hand, the signature of Blankenheym & Nolet, as it appears on the "Key" brand label (Exhibit 2, photo VIII) has been changed in the "Bell" label (Exhibit 2, photo VIII) in order to make it resemble as much as possible, at first glance, that of Van den Bergh & Co., and this inevitably causes confusion among foreign buyers who glance at the figure without reading the text.

At Washington, in 1897, Blankenheym & Nolet merely made an affidavit claiming prior right to the "Bell" trade-mark since 1877, one year after Van den Bergh had filed their mark, i. e., in 1876. Besides the priority in the United States, as shown by Van den Bergh & Co. since 1844, of the "Bell" trade-mark, I invoke the following affidavits of Mr. Philippe Raeymaeckers, who has been a member of the firm of Van den Bergh & Co. since 1840, in opposition to the claim made by Blankenheym & Nolet, to wit:

(1) His affidavit of the 31st of December, 1875, before the United States Consul at Antwerp, which document was sent the same day to the Commissioner of Patents at Washington, and which I presume is still in the archives of the Patent Office. 215–40

(2) His affidavit of the 22d of November, 1902, before the United States Consul General at Antwerp, confirming and strengthening his former declaration (see Exhibit number 7).

An important consideration is the following, viz., Mr. Philippe Raeymaecker, who was a contemporary of Janssen & Van Pee, predecessors of Van den Bergh & Co., 1836 to 1843, testifies to facts of which he has personal knowledge and which he himself was able to observe; furthermore, he worked for a certain time with the assistance of Janssen & Van Pee after 1843. Besides the foregoing, the books and documents preserved by Van den Bergh & Co., show that in reality the shipments made by Van den Bergh & Co. to the United States already existed in 1844 and 1845, under the trade-mark, "The Bell," and they have always been continued since then to this day. A lawsuit at Rotterdam was instituted in 1881 and 1882, by Van den Bergh & Co., against Blankenheym & Nolet for using the "Bell" trade-mark. The court rendered on April 12, 1881, an interlocutory judgment, which says (but most erroneously, as was declared by Van den Bergh & Co.'s attorney in writing several times and from the very outset), that Van den Bergh & Co. had acknowledged that Blankenheym & Nolet had used the said trade-mark ever since 1840. Blankenheym & Nolet merely invoked this use of the trade-mark since 1840 without giving the slightest proof, a proof which the court, furthermore, did

not even demand from them; a proceeding which, to say the least, is singular, inasmuch as the attorney, Mr. Reepmaker, one of the lights of the Dutch bar, never acknowledged in his pleading that Blankenheym & Nolet used the mark from 1840.

215–41 The mistake committed by the tribunal could not be rectified, as Dutch law in this matter does not allow appeal but only an action for quashing a judgment, which was of no avail in this case, inasmuch as the decision was only on a question of fact. In face of such an equivocal state of affairs created by the tribunal, Van den Bergh & Co., notwithstanding their right, were unable, as foreigners, to obtain justice, because the court had accepted the principal assertion made by Blankenheym & Nolet without demanding from them the slightest proof. I submit a letter from Johs. De Kuyper & Son, distillers, at Rotterdam, of the "Anchor" brand of gin, dated the 4th of October, 1898 (see Exhibit number 11):

"Messrs. Van den Bergh & Co., Antwerp:

"We have received your letter of the 1st instant, the contents of which has our entire sympathy. Unfortunately, our penal code protects us very little, as we can show by the following example. The firm of Van Meerten & Son, distillers at Delft (whom you doubtless know), applied some time ago to the trade-mark office at The Hague for the registration of their mark, the 'Anchor.' At our instance the application was refused twice, and yet this firm uses the mark with impunity. Twice we have filed a protest. The State's Attorney prosecuted, but the tribunal acquitted, saying that the action of the house in question did not come within the terms of the penal code. In 1891 the law was modified with regard to registration; at that time the penal code was not made to agree with it, so that what one gained by one law was withdrawn, so to speak, by the other.

"We shall soon call upon the Minister of Justice in order to lay the matter before him.

"Yours, etc.,

"(Signed) JOHS. DE KUYPER & SON."

215–42 As to the question of legal property in the "Bell" trade-mark for gin and other distilled products, this has been carefully examined and clearly defined by the courts of Spain in the two judgments which follow and which were rendered against Blankenheym & Nolet, at Rotterdam, notwithstanding the fact they invoked the interlocutory judgment of Rotterdam of 1882, as well as their affirmation, without the production of material proof, it is true, that they had used the "Bell" mark since 1840.

First Tribunal of First Instance at Madrid, the 12th Day of January, 1893.

Fallo.

Que debo declarar y declare que los Srs. Blankenheym & Nolet de Rotterdam, no han podi do usar en Espana la marca "La Campana" y en su virtud condene à Don Enrique Meulman, en representacion de estos à que se abstengan en lo succesivo de emplear en esta Nacion y sus posesiones de ultra-mar la marca indicada, sin hacar declaration sobre indemnizacion de per juicios, pr no acreditarse debidaments que se les hayen causado y sin hacer expresa condena de constas. Asi por esta mi sentencia, le pronuncio: mando y firmo:

BUENVENTURA MUNOZ,
Juez de Primera Instancia.

Publicado 12 de Enero, de 1893.

That I must declare and do declare, that Messrs. Blankenheym & Nolet had not the right to use the trade-mark of "The Bell" in Spain, in consequence of which I order Mr. Henri Muelman, the representative of the above-mentioned firm, to abstain from the use of the above-mentioned mark in this country and in its foreign possessions without pronouncing judgment as to the pecuniary damages, inasmuch as these have not been sufficiently established, and without making a special order for costs. Pronounced and ordered by this, my judgment, I sign:

BUENVENTURA MUNOZ,
Judge of First Instance.

Published January 12, 1893.

215-43 Second Tribunal of Appeal, at Madrid, the 28th of June, 1893.

Fallamos.

Que debemos confirmar y confirmamos, con las costas à la parte spelante, la sentencia apelada por que se declara que los Srs. Blankenheym & Nolet, del commercio de Rotterdam, no han podido usar en Espana la "Marca" "La Campana" y se condena à Enrique Muelman, en representacion de estos, à que se abstengan en lo sucesivo de emplear en esta Nacion y sus posesiones de ultramar, la marca indicada, sin hacer declaracion sobre indemnizacion de perjuicions por no acredi ditarse debidaments que se les hayan causado y sin hacer express condena de costas.

Asi por estra neustra sentencia la pronunciamos, mandamas y firamos:

FRANCISCO RONDAN,
ILDEFONSO LOPEZ ARANDA,
JOACHIM MAITON.

Publicada en 28 de Junio, de 1893.

Judgment.

That we are obliged to confirm, and do confirm, with costs against the appealing party, the judgment appealed against, by which it is declared that Blankenheym & Nolet, of Rotterdam, had not the right to use the trade-mark of the "Bell" in Spain, and in ordering the representative of the above-mentioned firm, Henri Meulman, to abstain from the use of the above-mentioned mark in this country and its foreign possessions without pronouncing judgment as to the pecuniary damages, inasmuch as these were not sufficiently established and without making a special order for costs.

Pronounced and ordered by this, our judgment, we sign:

FRANCISCO RONDAN,
ILDEFONSO LOPEZ ARANDA,
JOACHIM MAITON.

Published the 28th June, 1893.

In support of the rights of Van den Bergh & Co., I submit the following:

(1st.) Exhibit number 3, a list of Van den Bergh's principal registrations of their "Bell" trade-mark in various countries.

(2d.) Exhibit number 5, a list of 58 certificates of foreign houses, dated 1886, and worded as follows:

"The undersigned hereby declares and certifies to be aware from own experience that it is generally known in trade that Messrs. Van den Bergh & Co., of Antwerp, are carrying on the sale
215–44 of gin of their own manufacture with the sign of a 'Bell' under the denomination 'Bell,' 'Klok,' 'Campana;' and in the same manner that in foreign countries, when ordering or buying gin under the foregoing designation, it is admitted that the same proceeds from the old established business of the well-known firm of Van den Bergh & Co., at Antwerp. And, further, that alteration in any shape, modifications or changes of the sign of a bell are of little importance, provided the gin bears the denomination of 'Bell,' 'Klok,' 'Campana,' with reference to a bell."

Besides what precedes, Messrs. Bal & Co. and J. Meeus, distillers at Antwerp, and, consequently, competitors of Van den Bergh & Co., have declared that in foreign countries (trans-oceanic) when gin is ordered with the above-mentioned trade-mark, it is understood that the gin of Van den Bergh & Co. is meant, inasmuch as since the year 1843, when this firm took over the distillery of Janssen and Van Pee, the said distillery bore the sign of the "Bell" (see Exhibit number 2, photo H).

All these certificates, delivered by important and honorable houses, are duly legalized in the places where they were delivered and have served as documents in a suit won at Hamburg, by Messrs. Van den Bergh & Co.

(3d.) Divers price-lists from abroad, showing that the "Bell" gin of Van den Bergh & Co., at Antwerp, is sold everywhere at a higher price than that of other brands, and that, in consequence thereof, certain competitors find a great interest in imitating the trade-mark or appropriating it to their own use. (See Exhibit numbers 12 to 14.)

(4th.) Certificate of Mr. Paul Gelpi, of the firm of Paul Gelpi & Sons, at New Orleans (Exhibit number 6), showing that in 1874 his house bought Van den Bergh & Co.'s gin bearing the
215–45 "Bell" trade-mark, from Vor Maignan & F. Laborde and F. Laborde, successor, and that in 1877 the firm of Paul Gelpi & Brothers were in continual relations with Van den Bergh & Co. ("Bell" distillery), at Antwerp, and that it is sufficiently shown that their purchases were made regularly in 1874 and 1877, and that he is sure that the said business relations had at that time already existed for a long period.

(5th.) An important declaration under oath of Louis Lysen-Van den Bergh, partner of the firm of Van den Bergh & Co., covering the periods from 1843 to 1873, and from 1873 to 1901. (Exhibit 8.)

(6th.) Declaration by H. Arnouts, commission merchant, member of the Antwerp Chamber of Commerce, relating to the "Bell" trade-mark and to the shipments of Van den Bergh & Co. (Exhibit 9.)

(7th.) Certificate signed by Adrien Hass, Jr., of Rotterdam, given in 1866, to Van den Bergh & Co., and recalling his purchases

made at Antwerp in 1885 for Key West (Florida). (Exhibit number 10.)

(8th.) A certificate of Dussaq & Co., giving a list of shipments to Havana to be re-shipped thence to Key West. (Exhibit number 19.)

I here take the liberty to point out that the Patent Office at Berlin, from 1885 to 1901, refused the registration of twenty-three "Bell" trade-marks for gin, spirits, liquors and beers (Exhibit number 15), and, without hesitation, erased the names of eight other German firms who had registered the "Bell" trade mark. (Exhibit 16.)

Certain of the twenty-three marks refused by the Berlin Patent Office only resembled the "Bell" in a greater or lesser degree, but the Patent Office applied the principle, that is, he *he* says, in practice in all countries, namely, that trade-marks must not
215–46 resemble each other in any way that would lead to confusion in the minds of the public.

Before the court of Hamburg, in 1900, during the pleading, the interlocutory judgment of Rotterdam in 1882 was invoked against Van den Bergh and Company by Jan Tecker Gayen, distiller, at Altona, and an imitator of the "Bell" trade mark (Exhibit number 2, photos number XIV and XV). The Court, after perusing the judgment, was in no way misled as to its real purport and its mere interlocutory character. The Court, therefore, attached no importance to the said judgment in the interest of the defendant, Jan Tecker Gayen, and Van den Bergh & Co. won the case.

Claims Made in the United States of America.

I have never been in the United States, but I know that Van den Bergh & Co. have made efforts to make their products known by sending to their correspondents in the United States, advertising posters and cards. Among others the following shipments were made, together with the merchandise:

August 19th, 1885, to Foo, Hollander & Co., New Orleans, by SS. "Nantes," No. 41, 1 box containing 20 posters and 100 cards.

January 7th, 1886, J. F. Fontanel, Chicago, by SS. "Zeeland," No. 13, 1 box containing 10 posters and 100 cards.

January 8th, 1886, to Messrs. Purdy & Nicholas, New York, per SS. "Noordland," 1 box containing 20 posters.

June 17th, 1886, to Messrs. Paul Gelpi & Brothers, New Orleans, by SS. "Nantes," 1 box containing 20 posters.

December 23d, 1889, to Wichmann & Lutgen, San Francisco, by vessel "Anna," No. 31, 1 containing 25 posters in English and 300 cards.

The value of these posters and cards was never added
215–47 to the invoices for merchandise and assuredly the customers above mentioned, like all the others, used them and distributed them in all directions. I would add that the label on the bottles alone is a constant advertisement and is in itself quite sufficient for goods of a superior quality known for so many years.

Nevertheless, Messrs. Van den Bergh & Co. understood the great importance of advertising in such a country as the United States of America, and on two occasions they have exhibited there at International Exhibitions, namely:

1876, at Philadelphia, where they obtained the "Certificate of Award for gin of fine grains." (See Exhibit number 2, sheet XIX.)

In 1884, 1885, at New Orleans, where they obtained the "Certificate of Award for Geneva, The Bell, First Degree of Merit." (See Exhibit 2, sheet XX.)

As in 1876, there was added to the shipment a large number of posters and 200 small bottles (or flasks) full of gin for distribution. I would respectfully observe that the fact that Messrs. Van den Bergh & Co. exhibited their sole and unique trade-mark, "The Bell," at the Philadelphia Exhibition in 1876 (one year before Blankenheym & Nolet claim to have used the same mark in the United States), is of enormous importance to them. Furthermore, since 1844, as has been shown, Van den Bergh & Co. have sent into the United States the real mark of "The Bell" up to 1901, without interruption.

As shown by the card annexed (Exhibit number 18), Van den Bergh & Co. have always obtained the highest awards at all exhibitions since 1865, and have made this known in their advertisements.

In order to enable the Honorable Commissioner of Patents to judge more easily of the ancient rights of Van den Bergh &
215–48 Co. to the exclusive and indisputable property in the "Bell" trade-mark for gin and other distilled products and the priority of its use in the United States as well as in all other countries, I submit the following table of dates and facts, to which I respectfully draw his attention, viz.:

1631, 22 August—The Magistrate of Antwerp grants to the owners (brewers) the right to use the sign "The Bell."

1804—20 Octobre—Public sale of the distillery (brandevinnerie) "The Bell," in existence since.

1804—Continuation of the exploitation of the "Bell" distillery.

1836-1843—Janssen & Van Pee, predecessors of Van den Bergh & Co., proprietors of "The Bell" distillery.

1836—Letter of J. F. Hoffman & Son, dated January, 1882, declaring that they manufactured bottles with the "Bell" trade-mark since 1836 and perhaps before (consequently for Van den Bergh & Co.'s predecessors).

1836—Statement made on the 20th of February, 1899, by Mr. Louis Meeus-Van Reeth, distiller, at Antwerp, saying that the "Bell" was the distinctive mark of the products of the "Bell" distillery prior to the year 1836.

1836—Important affidavits in December, 1902, by Mr. Louis Lysen-Van den Bergh, partner of the firm Van den Bergh & Co., made before the United States Consul General at Antwerp.

1843, December 15th—Janssen & Van Pee sell the "Bell" distillery to Max and Jean Van den Bergh.

1843, 15th December—Van den Bergh & Co. exploit this distillery from this date for their own account.

1844, April 23d—Consignment of gin, "The Bell," to Galveston (Texas), to H. A. Cobb & Brothers.

215–49 1845, 19th September—Consignment of "Bell" gin to Galveston, according to sales account with Maquinay, dated December 25th, 1845.

1868, December 5th—Consignment of "Bell" gin to New Orleans, to Vor. Maiganan & F. Laborde. The business relations with the latter and their successors continued without interruption from 1868 to 1877.

1868—Consular invoices of shipments of "Bell" gin preserved since 1868 in the archives of the United States — General at Antwerp.

1870, 30th April—Burning of the "Bell" works of Van den Bergh & Co.

1870—Continuation by Van den Bergh & Co. of their exploitation in works hired for the purpose.

1870, November—The "Bell" distillery rebuilt and enlarged and work resumed therein.

1875, 31st December—Affidavit by Philippe Raeymaeckers before the Consul of the United States, of Antwerp, sworn for the purpose of supporting the registration of the "Bell" mark at Washington.

1876, 25th April—Registration of the "Bell" trade-mark of the Patent Office at Washington.

1877-1901—Sales shown at New Orleans, San Francisco, Chicago, New York, Philadelphia.

1877—Certificate given by Paul Gelpi, of New Orleans, stating that his firm bought "Bell" gin from Van den Bergh & Co. in 1874, through Vor. Maignan and F. Laborde and from F. Laborde, successor; and that in 1877, the firm of Paul Gelpi & Brother was in constant business relations with Van den Bergh & Company at Antwerp.

1880, May 25th—First law relating to trade-marks in Holland promulgated.

1881, 7th February, 8th September—Van den Bergh & Co. register their trade-mark, "The Bell," at Amsterdam, without
215–50 the slightest opposition on the part of Blankenheym & Nolet.

1881, 29th June—Blankenheym & Nolet register a mark called the "Bell."

1881-1882—Van den Bergh & Co. bring suit against Blankenheym & Nolet at Rotterdam. The court gives an interlocutory judgment. Affair remains unsettled.

1886—58 certificates from foreign houses declaring that in foreign countries by "Bell" gin is understood the gin of Van den Bergh & Co., at Antwerp.

1887-1901—Sale at Havana of "Bell" gin from Antwerp for Key West and Tampa, stored in the bonded warehouse at Havana.

1897—Registration by Blankenheym & Nolet of their "Bell" trade-mark at Washington.

1900, October 2d—Renewal at The Hague by Van den Bergh & Co. of the registration of their trade-mark made in 1881 at Amsterdam, said renewal being without opposition on the part of Blankenheym & Nolet.

1902, 22 November—Affidavit by Mr. Philippe Raeymaeckers before the United States Consul General at Antwerp. Annulling at Rotterdam of the registration of thirteen "Bell" trade-marks of 7 distillers in Holland.

1895-1901—Annulling at Berlin and refusal of registration of 23 trade-marks of a bell, at the request of Van den Bergh & Co.

1876—Van den Bergh & Co. exhibit their "Bell" gin at the International Exhibition at Philadelphia and obtain the certificate of award.

1884-1885—Van den Bergh & Co. exhibit at the International Exhibition at New Orleans, and obtain a certificate of award for Geneva gin, "The Bell," first degree of merit.

1893, 12th January—Judgment against Blankenheym & Nolet, of Rotterdam, by the Court of First Instance at Madrid, prohibiting them from using the "Bell" trade-mark in Spain and
215–51 its foreign possessions.

1893, 28th June—Judgment against Blankenheym & Nolet, of Rotterdam, by the Court of Appeal at Madrid, which upholds in all points the preceding judgment of the 12th January, 1893.

To the cross-interrogatory sixteen he saith:

The gin in question, which is and always has been, shipped to the United States of America, is manufactured exclusively at Antwerp. It is always of one and the same sort and is the production of the distillations of fine grains. Each manufacturer has his method and his own process and these details of manufacture are the secret of the manufacturer. In consequence of what precedes, gins vary a little in taste, according to the distillery from whence they come and to the particular process used in their manufacture and with regard to their sale they are distinguished, not so much by any indication as to the country of their origin as by their labels, and these are different for every manufacturer who wishes to make his production known under his name.

To the cross-interrogatory seventeen he saith:

Copies of books and records showing the first sales and shipments to each customer for gin from fine grain made at Antwerp by Van den Bergh & Co. in the United States under their sole and unique trade-mark, "The Bell," "La Cloche," "La Campana," from 1844 to 1901.

From Invoice Book No. 7, 1844, from the 9th to the 27th of April, bearing in wax on the outside the primitive seal of the "Bell" and the firm of "Van den Bergh & Co.," just as the label bears to-day on the bottles. The invoice book is entirely written by the hand of Mr. Philippe Raeymaeckers, who is still a member of the firm of Van den Bergh & Co.:

215–52 APRIL 23D, 1844.

Shipped in consignment to H. A. Hobb & Brother by Belgian vessel "Jeanette Marie," Captain Pieuske, to Galveston (Texas):

50 baskets of Gin containing 1200 jugs of 95 centil...	1140	Liters
50 baskets of Gin containing 600 jugs of 95 centil....	570	
	1710	Liters
15 centimes rebate F.....	256.50	
F	542.85	
1800 jugs, 100 baskets, divers expenses, insurance, etc., etc.....	369.89	
F	912.74	

N. B.—Please refer to the affidavits of Philippe Raeymaeckers, dated 31st December, 1875, and 22d November, 1902, made before the U. S. Consul at Antwerp.

From same book:

APRIL 26TH, 1844.

Delivered for account of J. A. Elsen & Van Linden (Antwerp), on board of Belgian vessel "Jeanette Marie," Capt. Pieuske, bound for Galveston (Texas):

3 barrels of Gin containing 306 liters at 14 centimes P. B.....F.	42.84	
F.	90.87	
Expenses for clearing and loading.....F.	3.50	
F.	94.17	

215–53 *Original Account of Sale.*

DECEMBER 25TH, 1845 (copy).

Account of sale for a lot of Gin consigned to the undersigned at Galveston by vessel "Albertine," by Van den Bergh & Co., at Antwerp:

40 green boxes.
60 demijohns.
50 baskets.

150 lots of Gin, amounting, according to the invoice, to .....Fs.. 1,448.73

Sold with 25 per cent. profit, all costs to be borne by the buyer ..... Fr.. 362.43

1,812.16

Consignment of 19th September, 1845, 5 per cent. commission 90.60

1,721.56

At F. 5.50 equal $313.
S. E. & O.

Galveston, 25th December, 1845.
(Signed) A. MAQUINAY.

Certificate inscribed on the above account of sale:
"I certify that the above mentioned gins bore the trade-mark, or rather label, of 'The Bell,' as shown, and that the distillery of Van den Bergh & Co. also bore the sign of the 'Bell.'
(Signed) A. MAQUINAY."

Antwerp, January 4th, 1882.

Seen for the legalization of the signature of A. Maquinay.
(Signed) The Burgomaster, LEOPOLD DE WAEL.

Antwerp, the 5th of January, 1882.

215–54 For the period from 1845 to 1868 I refer to what I set forth in my reply to interrogatory No. eight, again repeating that the shipments of gin made by Van den Bergh & Co. to all countries during that time continually increased.

Uninterrupted relations with New Orleans from 1868 to 1901. In the beginning of 1868 the relations were with Vor. Maignan & F. Laborde, at New Orleans, according to the two letters produced in the reply to Question 7. A consignment was sent to this house, according to an invoice in the archives of the United States Consulate at Antwerp, by vessel "Friedchen," Captain Suhr, as follows:

December 5th, 1868. Van den Bergh & Co., "The Bell."
V. M. & F. L. 12 casks containing 2,852 liters Gin.
V. M. & F. L., No. ¼. 4 cases containing each 16 green cases gin.
V. M. & F. L., No. ⅝. 4 cases containing each 8 red cases gin.
V. M. & F. L., No. 9. 1 case containing 9 demijohns.
Together, 1296 Liters.
Amount of invoice, Frs., 2894.

For the net product of the above lots of gin, and other lots as well, Vor. Maignan & F. Laborde remained debtors on the 31st December, 1870, in the "Divers Debtors' Account Ledger" for the amount of Frs., 5,251.35.

In the ledger, 1871, F. 82, they are found as debited in the same account by transfer for the above balance, namely, F. 5,251.35, and the account "Exportations" (or consignments) was debited in the

ledger, 1871, F. 25; January 1st, with the balance of this
215–55 shipment, per "Friedchen," unsold, namely, Frs., 90. The business relations begun with New Orleans in 1886, as has been shown, continued without interruption until 1901, as is further shown under B, C and D, and, furthermore, by the testimony under oath of Mr. Paul Gelpi, at New Orleans.

Ledger, F. 25, 1871, June 30—Consignment to the same people of 64 cases of gin per steamer "Baron Lambermont."

Ledger, F. 25, 1871, Sept. 30—Shipment to the same people of ten kegs of gin per steamer "Montgomery."

Ledger, F. 25, 1872, Feb. 29—Shipment to the same people of 100 cases of gin per steamer "Alice."

Ledger, F. 68, 1874, Nov. 30—Sale to Vor. Maignan (successor of Vor. Maignan & F. Laborde), at New Orleans, of 100 cases gin per steamer, name not given. (The consular invoices still exist.)

Shipping Record, F. 9, Feb. 12th, 1877—Aug. Merino, at Philadelphia; shipped per steamer Nederland to Philadelphia, Am., 30 cases gin.

Shipping Record, F. 13, June 12th, 1877—Paul Gelpi & Brother, at New Orleans. Shipped by steamer "Flamengo," via England, P. G. & B., 25 cases gin.

Shipping Record, F. 107, October 27th, 1882—To Purdy & Nicholas, at New York; shipped by steamer "Waesland," 50 cases gin, P. & N., New York.

Shipping Record, F. 108, November 15th, 1882—To Zuricalday & Arguimbau, to New York. Shipped by steamer "Pieter de Coninck," Z. & A., New York, 50 cases gin.

Shipping Record, F. 121, May 26th, 1883—To S. L. Jones & Co., at San Francisco, shipped by vessel "Three Brothers," S. L. J. & Co., San Francisco, 10 cases gin.

Shipping Record, F. 38, 19th August, 1885; Current
215–56 Accounts, F. 109—To Foo Hollander & Co., New Orleans. Shipped by steamer "Nantes," F. H. & Co., 40 cases gin and 1 case posters and 100 cards.

Shipping Record, F. 25, 4th of February, 1885; Current Accounts, F. 33—To Aug. Merino & Co., at Philadelphia (suc. to Aug. Merino). Shipped by steamer "Nederland," A. M. & C., P., 50 cases gin.

Shipping Record, F. 44, 7th January, 1886; Current Accounts, F. 17—To J. F. Fontanel, at Chicago. Shipped by steamer "Keeland," J. F. F., Chicago, 12 cases gin and 1 case containing 10 posters and 100 cards.

Shipping Records, F. 80, August 26th, 1887; Current Accounts, F. 92—To Thurber Whyland & Co., at New York. Shipped by steamer "Nordland," T., 50 cases gin.

Shipping Record, F. 74, June 4th, 1887; Current Accounts, F. 65—To Louis E. Albin, at San Francisco. Shipped by steamer "Viscount," V. D. B. & Co., 30 cases gin.

Shipping Record, F. 103, December 24th, 1888; Current Accounts—To A. Lavida, at New York. Shipped by steamer "Westernland," L., 100 cases gin.

Shipping Record, F. 99, September 20th, 1888; Current Accounts,

F. 113—To G. S. Nicholas, at New York (successor to Purdy & Nicholas), by steamer "Westernland," Ny., 100 cases gin.

Shipping Record, F. 105, March 22, 1889; Current Accounts, F. 46—To Zuricaldav & Co., at New York (successors to Zuricaldav & Arguimbau). Shipped by steamer "Westernland," Z. & C., 25 cases gin.

Shipping Record, F. 121, December 23, 1889; Current Accounts, F. 158—To Wichman & Lutgen, at San Francisco. Shipped by German steamer "Anna," W. & L., 30 cases gin, one case containing 25 posters and 300 cards.

215–57 Shipping Record, F. 195, November 12, 1895; Current Accounts, F. 144—To Baldwin Brothers & Co., at New York. Shipped by steamer "Otranto," B. B. & Co., 100 cases gin.

Shipping Record, F. 19, Feb. 19, 1898; Current Accounts, F. 252—To Paul Gelpi & Sons, at New Orleans (successors to Paul Gelpi & Brother). Shipped by steamer "Herman," P. G. & C., 100 cases gin.

Shipping Record, F. 14, December 1, 1900; Current Accounts, F. 153—Shipped to N. Charouis, at New York, by steamer "Cuthert," N. C., New York, 25 cases gin.

Besides the sales to "Divers" for the United States of America, I would mention the following:

Shipping Record, F. 40, October 20, 1885; Current Account, F. 133—To Adr. de Baas, Jr., merchant at Rotterdam, sent by rail to Rotterdam to be transshipped to Key West, A. D. H., Key West, 50 cases gin.

Shipping Record, F. 42, December 7, 1885—To Adr. de Baas, Jr., merchant, Rotterdam, shipped by steamer "Telegraaf" to Rotterdam to be transshipped there for Key West (Florida), A. D. H. (Key West), 100 cases gin.

Besides the above, there were important shipments and numerous from Antwerp since 1887 to Havana to Messrs. Dussaq & Co., for sale to Key West and to Tampa (see reply to interrogatory No. 8).

Shipping Record, F. 219, December 15, 1887—First shipment by steamer "Bremena," 100 cases gin.

Sales Account, April 7—100 cases gin, ex. steamer "Bremena."

To the cross-interrogatory eighteen he saith:

In the books and from the documents preserved. The information is also given by the consular invoices on file at the United

215–58 States Consulate General at Antwerp since 1868.

To the cross-interrogatory nineteen he saith:

From the books and documents preserved at Van den Bergh & Co.'s offices, as well as from the consular documents already referred to from 1888 to 1901.

To the cross-interrogatory twenty he saith:

In reply to this question I refer entirely to what I have said in answer to interrogatory 7 and 12 relative to the use of the "Bell" trade-mark (The Bell—la Campana) with the documents to support the same. This label was used solely from 1836 to 1843 by Janssen & Van Pee, the predecessors of Van den Bergh & Co., for their gin, the only distilled product then manufactured. Van den Bergh &

Co. continued the use exclusively of this label from 1843 to 1901 for their gin, as well as for all their other distilled products.

To the cross-interrogatory twenty-one he saith:

Yes, Van den Bergh & Co. did institute a suit in 1881 and 1882. The court gave an interlocutory judgment, but did not decide the question in principle. This judgment is based on an incomprehensible error, inasmuch as the attorney for Van den Bergh & Co., Mr. W. A. Reepmaker, never acknowledged in his pleadings the fact that Blankenheym & Nolet had, as alleged, used the "Bell" trademark for gin since 1840. He stated formally in writing and on several occasions that he had not acknowledged it. Furthermore, Blankenheym & Nolet stated that they had used the "Bell" trademark for gin since 1840 without furnishing the slightest material proof. The Dutch law, unfortunately, does not allow of an appeal, but only an action for the quashing of the judgment, which could not be availed of, inasmuch as judgment was given on a question of fact. Van den Bergh & Co. did not follow up in 1882
215,59 the interlocutory judgment, as there was some difficulty in getting together the witnesses to give testimony regarding a period so remote in order to prove the use of the "Bell" trademark before 1840. Certain witnesses had disappeared. Since that time, however, they have collected evidence which, at the proper time, may be used, with every chance of success.

Read over, subscribed and sworn to by the witness in my presence this 16th day of February, 1903.

———, ———.

United States Consul General, Commissioner.

215,60 Before the Examiner of Interferences.

Interference No. 21,506.

In the Matter of the Interference of
VAN DEN BERGH & Co.
vs.
BLANKENHEYM & NOLET.

PAUL RAEYMAECKERS, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by Messrs. Briesen & Knauth, counsel for Van den Bergh & Co., as follows, viz.:

To the first interrogatory he saith:

Paul Raeymaeckers, Antwerp, of no profession.

To the second interrogatory he saith:

I am the son of Philippe Raeymaeckers and was correspondent in the firm of Van den Bergh & Co. from the year 1862 to the year 1898. The firm of Van den Bergh & Co. is in fact junior party in this interference.

To the third interrogatory he saith:

The business of the firm of Van den Bergh & Co. consists in the sale of the product of its manufacture and in other commercial af-

fairs. This business has been carried on by Van den Bergh & Co. since 1843 and the distilling of gin was carried on by their predecessors ever since 1804.

To the fourth interrogatory he saith:

The trade-mark is a "Bell," which is the sign of the distillery ever since its foundation.

The firm of Van den Bergh & Co. has used this trade-mark always for the sale of the products of its manufacture, the principal of which are gin, beer, alcohol, neutralized alcohol, bitters, divers liqueurs or alcoholic beverages, yeast and malt.

215-61 To the fifth interrogatory he saith:

The firm of Van den Bergh & Co. can show by its books and ancient documents, notably those which were the object of an "Act of Notoriety" of the 8th of September, 1898, and the 24th of September, 1901, and by what Mr. Philippe Rueymaeckers has to say, that the "Bell" trade-mark was adopted by them in 1843 when they purchased the distillery from Messrs. Janssen & Van Pee, who had previously used the "Bell" trade-mark.

To the sixth interrogatory he saith:

Messrs. Van den Bergh & Co. contest the right of any one to use the "Bell" trade-mark for gin, alcohol or other distilled liquor.

To the seventh interrogatory he saith:

The commercial relations of the firm of Van den Bergh & Co. with the United States of America date from 1844, as is shown by a shipment, among others, to A. H. Cobb & Brother, at Galveston, and the sales account of Alfred Maquinay, at Galveston, the first dated 1844 and the second 1845. These relations were continued progressively from that date up to the present time.

To the eighth interrogatory he saith:

Mr. Theodore Colart can show more exactly than myself the names of buyers and the importations of "Bell" gin into the United States.

To the ninth interrogatory he saith:

The consular invoices relating to the shipments of the firm of Van den Bergh & Co. are to be found in the archives of the United States Consulate General at Antwerp and have been preserved there since 1868.

To the tenth interrogatory he saith:

The bottles which have always been used by the firm of Van den Bergh & Co. for the shipments of their gin to the United

215-62 States of America are long and four-sided; the neck is short and shaped in such a manner as to enable it to be covered by a capsule or else terminating in a round mouth. On the shoulder of the bottle, in relief is the trade-mark of a "Bell," surrounded by a circle, and within the circle the name of the firm. As to the label, I refer to Exhibit V. The figure of the "Bell" is the principal figure and is surrounded by such indications as will enlighten the buyer as to the nature of the product contained in the recipient and as to its origin, that is to say, a product of Van den Bergh & Co.

To the eleventh interrogatory he saith:

The bottles are prepared in this way by Van den Bergh & Co.,

shipped in solid and safe packages. I do not think the firm of Van den Bergh has met with any complaints on the part of their buyers in the United States. I, therefore, feel myself justified in stating that all payments were made regularly.

To the twelfth interrogatory he saith:

Messrs. Van den Bergh & Co. adopted the "Bell" trade-mark in December, 1843. It is known that the predecessors, Janssen & Van Pee, used the same trade-mark for the sale of their gin. Furthermore, the invoices bore on their faces as letter-heading the "Bell," as it is stated in the Act of Notoriety of September 24th, 1900, paragraph II; also in the certificate of Mr. Louis Meens mentioned in the same act (number XIV), which asserts that Messrs. Janssen & Van Pee used this trade-mark since 1830, as is also shown in the certificate of Philippe Raeymaeckers. (See Exhibits Nos. I and VII.)

To the thirteenth interrogatory he saith:

No.

To the fourteenth interrogatory he saith:

215-63 From the moment when the "Bell" distillery was taken over by Van den Bergh & Co. the shipments were considerably increased to all countries, notably to the United States of America. The use of the trade-mark "The Bell" by the firm of Van den Bergh & Co. for all its products without distinction has continued without any interruption whatever.

To the fifteenth interrogatory he saith:

The laws regarding the protection of industrial property in a large number of countries dates from 1874, 1875; or rather it is about this time that the international treaties relative thereto began to take definite shape. The firm of Van den Bergh & Co. was one of the first to register its trade-mark "The Bell" in various countries, and everywhere the registration was accepted, that is to say, the property in the mark was never disputed by any firm. The first opposition dates from the time when Van den Bergh & Co. took steps in the United States not to file a new mark, but to renew the registration made in 1876. Messrs. Blankenheym & Nolet are trying to oppose the upholding of Van den Bergh & Co.'s exclusive right to the "Bell" trade-mark by invoking as their sole argument an interlocutory judgment pronounced by the court at Rotterdam April 12th, 1882, calling upon Van den Bergh & Co. to prove by witnesses that Van den Bergh & Co. used the "Bell" trade-mark prior to the year 1840. This above-mentioned judgment, which was merely interlocutory, was never followed up because Van den Bergh & Co. could not collect at that time the necessary evidence, which they now have in their possession, to establish their claim. The documents produced by Mr. Theodore Collart can leave no doubt as to the exclusive right of Van den Bergh & Co. in the property of the "Bell" trade-mark for their products, notably their gin.

215-64 Messrs. Blankenheym & Nolet have vainly invoked, as another firm has done, the before-mentioned judgment as an argument against the claim of Van den Bergh & Co., but the courts where this has been done have paid no attention whatever to it. The following are the circumstances under which the

judgment at Rotterdam was given, viz.: By virtue of the law promulgated in Holland May 25th, 1880, and relating to the protection of industrial property and immediately after the conclusion of the treaty of reciprocity between Holland and Belgium, Van den Bergh & Co. filed their "Bell" trade-mark in Holland. This was done February 7th, 1881. Van den Bergh & Co. thought it necessary at that time to immediately begin actions against all the imitators of their trade-mark in Holland. The firms in question were:

Van Dulken, Weiland & Co., Rotterdam.
J. A. J. Nolet, Schiedam.
E. J. F. Brands, Rotterdam.
Hoogendyk & Zonen, Waardingen.
J. H. Henkes, Delftshaven.
Daniel Visser & Zonen, Schiedam.
Blankenheym & Nolet, Rotterdam.

The two first-named firms recognized the bona fide and the indisputable rights of Van den Bergh & Co. and against them all action was withdrawn as soon as they had consented to withdraw their mark from the register. The withdrawal of the hereinafter-mentioned firms was rendered compulsory by the Court of Rotterdam by judgments given as follows:

Against A. Houtmann & Co., 22d March, 1882.
E. J. F. Brands, 12th April, 1882.
J. H. Henkes, 12th April, 1882.
Daniel Visser & Zonen, 12th April, 1882.
J. Hoogendyk & Zonen, 19th May, 1883.

As before mentioned, it was the 12th of April, 1882, that
215–65 the interlocutory judgment was rendered in the case of Blankenheym & Nolet. The judgment reads as follows:

"Whereas, the defendants, Blankenheym & Nolet, claim that they have used the trade-mark which is the object of this litigation since 1840, and the plaintiffs have not disputed the truth of this assertion, the fact may, therefore, be considered as admitted by the parties.

"Whereas, as it has been shown by the parties, the defendants, Blankenheym & Nolet, do not admit that the plaintiffs, Van den Bergh & Co., made use of the mark before the registration made the 25th day of April, 1863 (at Antwerp, Belgium), and whereas the plaintiffs should be allowed, as they have offered to do, to prove by witnesses that they or their predecessors used the "Bell" trade-mark for the packing of their gin manufactured by them before 1840;

"By virtue of the law of the 25th of May, 1880, Staat-blad 1885: Before rendering a final judgment as to the principles involved in the foregoing petition:

"(The Court) permits the plaintiffs and, as far as necessary, orders them to prove by witnesses that they or their predecessors used the 'Bell' trade-mark, as shown on the labels afore cited, for the packing of their Gin;

"Orders that the hearing of the witnesses shall take place before a 'Judge Commissaire' and to this effect appoints Mr. J. W. Van Sosterzee a judge of this court, to whom application should be made

teen days after the notification of this judgment for authorization
call the witnesses."

As to the rights of Van den Bergh & Co. in Germany I refer to
e statement drawn up by their agent, Mr. J. von Schlieben, of
amburg. See Exhibit 16.

The "Bell" trade-mark in Germany is protected in the
5-66 most rigorous manner. However, Van den Bergh & Co.
had to fight against most tenacious imitators of their mark
Germany, who made themselves known to the export trade. In
86 Van den Bergh & Co. obtained the recognition of their rights
the decision of the Supreme Court at Berlin after a long suit
ainst J. Ferd Nagel, of Hamburg. This fact, however, did not
sconcert the numerous German manufacturers, who attempted to
itate the "Bell" trade-mark in every way possible. In 1895 they
countered the severe measures taken by the Berlin Patent Office
r the protection of the "Bell" trade-mark, inasmuch as the de-
rtment had become aware of the numerous attempts and the sub-
rfuges used to infringe upon the rights of Van den Bergh & Co.
The imitators of the "Bell" trade-mark, finding themselves at
st checked, formed a league, the object of which was to petition
e Patent Department to declare that, inasmuch as the "Bell" trade-
ark was used by such a large number of firms for gin and spirits,
should be pronounced a "free trade mark," that is to say, free to
used by any one.

This occurred in 1900 and the demand was refused by the Berlin
tent Office, which department resolved to protect Van den Bergh
Co. in their exclusive right to the "Bell" trade-mark for the
oducts of their manufacture. The Patent Department were man-
stly satisfied at the action taken by Van den Bergh & Co., who
tained through the German courts injunctions against several
ms for using the "Bell" trade-mark, which they had registered
ce a long time. At this time a firm invoked the interlocutory
dgment of the Court of Rotterdam in re Van den Bergh & Co.
rsus Blankenheym & Nolet of April 12th, 1862, but this was not
ken into account.

I take the liberty of calling the attention of the United
5-67 States Patent Office to the reputation of the products of
Van den Bergh & Co., notably their Gin sold under the
ell" label in the trade of the entire world. I also call attention
the origin of the mark as shown by the Acts of Notoriety and
e other documents hereto annexed and herein cited on behalf of
n den Bergh & Co. and referring to the establishment known as
The Bell" since 1631. (See Exhibits numbers I to XIX.)

To the cross-interrogatory sixteen he saith:

I do not think it necessary to give the details of the mode of fab-
cation of gin by Van den Bergh & Co., nor to make any statement
to whether Van den Bergh & Co. own any other work. All the
n shipped to the United States by Van den Bergh & Co. is manu-
ctured by Van den Bergh & Co. in their Antwerp distillery.

To the cross-interrogatory seventeen he saith:

I can only refer to the extracts of the account books submitted

by Theodore Collart as also to the Acts of Notoriety of 1898 and 1900, and to the affidavits of Philippe Raeymaeckers of 1875 and 1902.

To the cross-interrogatory eighteen he saith:

From the books and ancient documents in the possession of the house and from the Consular Invoices on file at the United States Consulate General at Antwerp.

To the cross-interrogatory nineteen he saith:

The reply to this interrogatory has been left to Mr. Theodore Collart.

To the cross-interrogatory twenty he saith:

Messrs. Van den Bergh & Co., since 1843, and their predecessors, since 1631, have occupied the buildings that bear the sign of "The Bell," situated in the Canal des Brasseurs at Antwerp.

It appears from the documents annexed and herein cited
215–68 that from 1836 to 1843 Janssen & Van Pee used the "Bell" trade-mark for the exportation of their gin distilled from grain, their only distilled product, and from 1843 up to the present day Van den Bergh & Co. have used the mark for the exportation of all their distilled products.

To the cross-interrogatory twenty-one he saith:

It does not appear in the judgment of the Court of Rotterdam that Blankenheym & Nolet proved that they used the "Bell" trade-mark for their gin ever since 1840.

Read over, subscribed and sworn to by the witness in my presence this 16th day of February, 1903.

_____,
United States Consul General, Commissioner.

216 DEFENDANT'S EXHIBIT "12."

The Government of the Philippine Islands.

Executive Bureau, Division of Archives, Manila.

General Public Registry of Commerce.—Second Section.—Page 3.—8.—On December 16, 1898, His Excellency, the Governor-General, issued a certificate of ownership of trademark in favor of Patricio Ubeda Gallego as importer in this market of the wine known as "Tres Campanas."

I certify that the foregoing is a true and correct copy of its original on file in this office, and in witness thereof I hereunto set my hand and affix the seal of this Bureau at Manila the 9th day of April, 1907.

[SEAL.] (Signed) M. DE IRIARTE,
Chief of Division.

(Rubber Stamp of) Executive Bureau, Division of Patents, Copyrights and Trademarks. Documentary Stamp 20 centavos.

217 On November 6th, 1907, the Bill of Exceptions was duly filed in the Supreme Court.

Thereafter and on January 24th, 1908, counsel for plaintiff and appellant filed his brief in the Supreme Court accompanied by the following

Assignment of Errors.

I.

The trial court erred in holding that plaintiff has no cause of action upon which to base the complaint filed by him in this case.

II.

In admitting in evidence and considering as such the certificate issued in 1873 by the Minister of the Interior of Spain to Van Den Bergh & Co. for the use of the trademark known as "Ginebra de la Campana."

III.

The court erred in holding that plaintiff is not the owner of the trademark described in paragraph III of the complaint, and which appears on Exhibits "D," "E" and "F."

IV.

The court erred in holding that the trademark and seal used by defendant have no resemblance or similarity to those of plain-
218 tiff, so that it would induce the public to believe that those of the former are those of the latter.

V.

The court erred in holding that defendant is not guilty of unfair competition.

VI.

The court erred in not directing defendant to indemnify plaintiff for the damages sustained by the latter on account of defendant's acts.

The case was duly argued in the Supreme Court of the Philippine Islands on the 22nd day of July, 1908, and on the 17th day of February, 1909, the said court rendered its decision in the words and figures following, to-wit:

219 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 4392.

PATRICIO UBEDA, Plaintiff and Appellant,
vs.
AGAPITO ZIALCITA, Defendant and Appellee.

FEBRUARY 17, 1909.

ARELLANO, *C. J.*:

Patricio Ubeda, owner of the registered trade-mark "Ginebra Tres Campanas," claims and alleges loss and damages by reason of the imitation of his trade-mark by the defendant, who has been selling gin in bottles bearing said trade-mark, and using a label design that greatly resembles his; that the only difference between them is that of the defendant, instead of bearing the words "Ginebra Tres Campanas," reads "Ginebra de Dos Campanas," and in the center thereof, instead of "Particio Ubeda," it reads "Gavino Barreto"; that the remainder of the trade-mark is a copy of his own; and that as the defendant, the plaintiff avers, has thus sold gin to the value of not less than P50,000, from which he has obtained a profit of P10,000, the plaintiff's sales have been decreased by that amount and he has failed to *perceive* the said profit of P10,000 which he would have obtained if he had made such sales. In conclusion he prayed
220 that the defendant be ordered to account for all sales made by him of gin put up in bottles bearing the trade-mark, design, or any of the distinctive marks belonging to the plaintiff, and that, after the extent of such sales has been ascertained, the said defendant be ordered to pay the plaintiff double the amount thereof as indemnity for loss and damages; that the defendant be forever prohibited from using the device or trade-mark of the plaintiff, or any other trade-mark or design bearing any resemblance to those of the plaintiff, and that he be sentenced to pay the costs of the proceeding.

The defendant, Agapito Zialcita, opposed the demand for various reasons which he advanced as a special denial to the complaint, and the Court of First Instance of Manila, after hearing the evidence adduced at the trial, absolved him from the complaint filed by the plaintiff therein Patricio Ubeda, with the costs against the latter. The plaintiff appealed from the judgment and moved for a new trial; his motion was overruled, to which motion he excepted and submitted a bill of exceptions to this Court for the purposes of this appeal and a review of the facts and evidence offered in the first instance.

On the appeal it appears:

That the plaintiff is the owner of a trade-mark described in the third clause of his complaint as:

Two concentric circles, the larger fifty millimeters in diameter, and the smaller thirty-three, eight millimeters apart. In the upper part of the ring formed by the imposition of one circle over the other, are the words "Ginebra de Tres Campanas," and in the lower part,

the name of the plaintiff "Particio Ubeda." Inside the smaller or center ring there are three bells, united together and tied at the top by a ribbon and an ear of some cereal, the ends of which fall over the two posterior and lateral bells. On the lower part of said
221 bells the words "Extra Superior" are written. Above the two circles and almost diametrically crossing them the fac simile of the signature and rubric of the plaintiff, that is "Patricio Ubeda," is stamped in black ink; said fac simile commences on the three first letters of the word "Ginebra" and ends at the letter "P" of the word "Campanas," crossing the three bells; the rubric terminates on the lower part of the bell at the right of the other two, viewed from the front, though skirting it a little at the left. Outside, and above the larger ring, are the following words in small print: "Para evitar la falsificación, nuestras etiquetas se hallan depositadas y allevan nuestra firma." (To prevent falsification, our labels are registered and bear our signature), and below and also outside is the word "Manila."

That said mark was registered at the late Dirección General de Administración Civil of the Spanish Government on December 24, 1898; that on July 31, 1905, the plaintiff cautioned the defendant to stop using a mark similar to his own, but, notwithstanding the warning, the defendant continued to use said similar mark; that the defendant, in addition to a general denial in his answer, alleged as a special defense: (1) That no similarity or resemblance exists between the trade-marks used by him and those of the plaintiff; (2) that long prior to 1880 the distinctive device or trade-mark "Ginebra de la Campana" of Van Den Bergh and Co. was entered and registered the old Dirección General de Administración Civil, at present the division of patents, copyrights and trade-marks of the Executive Bureau, which trade-mark is similar to or greatly resembles that one described by the plaintiff in his complaint; and (3) that the device now used by the plaintiff, which is different from that registered by him is also another falsification of that of Van den Bergh and Co., and which he managed to register by taking advantage of the first days of the American occupation of the city of Manila; said plaintiff has been using both marks, one after the other for the purpose of defrauding and deceiving the public as to the nature, origin,
222 and properties of his gin, confusing it with that of Van Den Bergh & Co., and thus selling cheap product at the same price as the gin of Van Den Bergh & Co., which, for the reason that it is imported from Europe, costs more than his.

The imitation charged by the plaintiff to the defendant was the subject of argument and proof, in the consideration of which the judgment appealed from deals at length; but for the purposes of the law the following conclusions contained in the said judgment suffice to determine the question:

First, That the title of ownership of the plaintiff, Exhibit A, was issued to the plaintiff on December 16, 1898, for a trade-mark which is not exactly the same as the one described in the complaint, because, although the said titles or trade-marks bear the same circular form, and around the two concentric circles the words "Patricio Ubeda," "Ginebra de Tres Campanas" and "Extra Superior" appear,

and on the outside are the words "Para evitar la falsificación, nuestras etiquetas se hallan depositadas y llevan nuestra firma," and the center is of a gold color, which is the color of the entire label "Tres Campanas," and the signature "Patricio Ubeda" in black, yet on the lower part of said label outside of the larger circle of the trade-mark is seen the word "Amberes," (Antwerp), whereas on the other, in lieu thereof is printed the word "Manila"; this difference was explained at the trial as follows: That the said title was issued to the plaintiff to sell gin in these islands imported from Antwerp, with the said label, but not manufactured by the plaintiff as stated in his complaint; the difference between the registered trade-mark and the other is also noticeable because on the latter the words or legends previously described are not embossed, nor is the gold coloring in the one of the same shade as in the other.

Second. That on the other hand there appears from the certified copy Exhibit S, that a certificate was issued on the 11th of December, 1873, by the Ministerio de Fomento in Spain to Van Den Berg & Co., manufacturers of wines at Antwerp, according them the use of the mark "Ginebra de la Campana," Van Den Bergh & Co.," with the right to use said trade-mark in Spanish territory and foreign possessions; said mark appears as Exhibit 3, and bears a great resemblance to Exhibit A, the title of ownership of which, according to said exhibit, was issued to said plaintiff by the aforesaid Dirección de Administración Civil; the only difference between the two trade-marks being, that three bells are printed on that of the plaintiff, in the center of the two circles, with the signature of Patricio Ubeda in black ink crossing the two circles, while that of Exhibit 3 has only one bell inside the circles, with a signature of Van Den Bergh
223 & Co. crossing the said circles; there has been and there still is on sale on this market bottled gin bearing the said trade-mark, as was also proven at the trial; said trade-mark was registered in the Bureau of Archives in November, 1903 in view of the fact that no record could be found of the registration of the trade-mark "Tres Campanas" and for the reason that said trade-mark of Van Den Bergh & Co. had already been registered in the United States.

Third. That the similarity existing between the trade-mark "Ginebra de la Campana, Van Den Bergh & Co." and the trade-mark "Ginebra de Tres Campanas, Patricio Ubeda," under the circumstances mentioned with respect to the registration or issuance of the title of ownership of the second of the said trade-marks in favor of the plaintiff, should be taken into account for the due appreciation of the acts of the parties herein, and their respective rights in this litigation, because it all tends to explain in some way the conduct of the defendant and at the same time shows that all the trade-marks bearing more or less bells, familiar to the trade here on gin bottles, are nothing more than a variation of the mark "Ginebra de la Campana, Van Den Bergh & Co." or bear some resemblance thereto, and shows that if it was a matter of judging simply from the similarity or resemblance between two trade-marks, the plaintiff has no right to charge the defendant with being a competitor in bad faith, for having used the trade-mark "Dos Campanas."

In effect, the following communication received by the plaintiff on the 12th of December, 1898, from the Dirección General de Administración Civil, is one of the documents offered by him as a preliminary title:

By a resolution of the 5th inst. * * * this Dirección General has been pleased to grant you the ownership of the enclosed trade-mark for wines denominated "Tres Campanas," of which you are the importer in this market, upon payment of the corresponding fees.

But the said trade-mark reads on the outside lower part, "Amberes," and in diminutive characters toward the right hand bears the lit-ographer's name, "Litografía Ramirez y Ca., Madrid." So that the license granted him was for the use of an Antwerp trade-mark, for gin imported into these islands, while the trade-mark described in the complaint as being imitated, is one for gin manufactured in these islands, for which the license granted was not obtained; and according to a certificate of the Bureau of Archives of this
224 Government, there is only one entry on file, as follows:

Registro Publico y General de Comercio.—Section 2, folio 3, 8.—Under date of December 16, 1898, His Excellency, the Governor-General, issued a title of ownership of a trade-mark in favor of Don Patricio Ubeda Gallego, as importer in this market of the wine denominated "Tres Campanas."

This entry is not exactly that of the title, Exhibit A, issued on the 16th of December, 1898, but of its recording in the division of agriculture, industry, and commerce of the said Dirección which actually appears under number 8 of folio 3 of the second registry of industrial and commercial trade-marks, dated the 24th of the same month and year.

Patricio Ubeda, on December 2, 1904, in reply to a communication from Van Den Bergh & Co., of Antwerp, told the said gentlemen that he was the proprietor of the trade-mark "Ginebra Tres Campanas" for the Philippine Islands under number 8, folio 3, of the second register of industrial and commercial trade-marks.

Upon comparing the trade-mark that appears at the foot of the title of ownership presented by the plaintiff, and which has the word "Amberes" on the lower outer part thereof, with the real and undisputed mark of Van Den Bergh & Co. of Antwerp, also bearing the said word upon the lower outer part, it is found that the description given in clause 3 of the complaint applies to the salient features of both, and that, when viewed from a distance, they appear alike; even to the characters used in the respective autographs stamped across both marks, the resemblance is perfect, and the type employed in the legend, the caution, class, and place of origin is the same in both. So that it may be said of Van Den Bergh & Co.'s trade-mark (exhibit 3) as of that of Patricio Ubeda's exhibit A3: Two concentric circles, the larger of fifty milli-
225 meters in diameter and the smaller 33, 8 millimeters apart. On the lower part of the bell the words "Extra Superior" are written. Above the two circles and almost diametrically crossing them, the facsimile of the signature and rubric of Van Den Bergh & Co. is stamped in black ink; said facsimile commences on

the first letter of the word "Ginebra" and ends at the letter "P" of the word "Campana." Outside and above the larger ring and in small letters (identical in both) are the following words "Para evitar la falsificación nuestras etiquetas se hallan depositadas y llevan nuestra firma." Below, and also outside, is the word "Amberes" of the same type and size, (in the one and the other trade-mark), not "Manila," as described in clause 3 of the complaint. The whole of the substitution consists of "Tres Campanas" for "La Campana," and "Patricio Ubeda" in lieu of "Van Den Bergh & Co.," both in the text and the signature, all of the same color, and, viewed from a certain distance as a whole, of exactly the same appearance; in other words such a mark as is applied to a bottle of characteristic design as that used for putting up gin.

The conclusion contained in the judgment appealed from, "that all the labels with more or less campanas (bells) used in this market on gin bottles are nothing more than a variation of the trade-mark "Ginebra de la Campana, Van Den Bergh & Co.," or bear a great resemblance thereto, is correct.

The plaintiff presents a registered trade-mark which can be seen at the foot of the title of ownership obtained for imported gin. According to the registered mark it would be gin imported from Antwerp. As the plaintiff was well aware, this mark existed here, although he says he was given to understand that the copyright had expired. And, as affirmed by the witness Ernest Appel, of
226 the firm of C. Heinzen & Co., of this city, he does not know when the "Ginebra de Una Campana" was first imported in these Islands, but, according to the books of said firm, which is the importer of it, the latter received a shipment of 500 cases on the 16th of January, 1892.

The trade mark of this gin was produced in evidence (Exhibit No. 3) prior to that of the plaintiff which, as stated by the latter "was registered in Spain," and he believed that it existed in the Islands, according to his declaration at folio 19 of the record; all the objection raised against its admission was based, first, in that the plaintiff did not derive any right from the mark of Van Den Bergh & Co.; second, in that said mark was not valid in the Philippines, because at the time when that of the plaintiff was registered the defendant had no right therein for the reason that any right which he might have possessed had expired; and third, in that this matter was foreign to the suit between the plaintiff and the defendant as *res inter alios acta*. Thus he assigns as error in the judgment "in admitting as proof the certificate issued in 1873 by the Ministerio de Fomento of Spain to Van Den Bergh & Co. for the use of the mark "Ginebra de la Campana." (Brief 2.)

So that, he adds, although it may be considered that the plaintiff's mark is an imitation of that of van Den Bergh & Co., from the fact that the mark of the latter had lapsed, it is evident that since 1898 the plaintiff was the only one who could lawfully *used* the mark "Ginebra Tres Campanas" and all other variations of the same were illegal. * * * In the said year 1898, apart from the said Double expiration (through prescription of ownership and

use) of the trade mark "Ginebra de la Campana," no one claimed to have any right thereto, and consequently the plaintiff, like any other person, could ask for, and the ownership could be granted him, not of a mark similar to that of Van Den Bergh & Co., but one exactly the same as the mark "Ginebra de la Capamana" and the grantee, could not be charged with bad faith. (Brief, 7 and 8.)

But under section 9 of Act No. 666:

No action, or suit, or criminal prosecution shall be maintained under the provisions of this Act * * * in any case where
227 the trade-mark, trade name, or the indicia of origin, ownership, or manufacture have been used by the complaining and injured party for the purpose of himself deceiving the public with respect to the character of the merchandise sold by him or of the business or profession or occupation carried on by him.

This is one of the defenses utilized by the defendant so far as he alleged that a party who had imitated the trade-mark of another could hardly be entitled to bring an action for an imitation of his own trade-mark. If, as claimed by the plaintiff the mark "Dos Campanas" used by the defendant, is an imitation and a variation of his own trade-mark "Tres Campanas," it is illegitimate and il-egal, and the conduct of the author of said imitation is deceitful and fraudulent and subject to an action for unlawful competition; it follows that the mark "Tres Campanas," of the plaintiff, being an imitation and a variation of the mark "La Campana" of Van Den Bergh & Co., is also illegitimate and il-egal, and the conduct of the plaintiff is in turn deceitful and fraudulent and subject to an action for unlawful competition. And being deceitful and fraudulent, that is to say, in as much as the petitioner, who claims to be the injured party, made use of the mark "Tres Campanas" for the purpose of deceiving the public with respect to the character of the merchandise sold by him, pretending under the title of ownership produced in evidence, to cau-e it to pass as imported from Antwerp when it was manufactured in Manila, as he has testified in this case, he cannot, under the provisions of said section 9, exercise any right of action or sue for what he claims in his complaint.

Neither through the lack of registration of the trade-mark of -an Den Bergh & Co. nor by reason of the expiration of the copyright for its use, could the plaintiff consider himself at liberty to
228 feel and with impuity use the same. Section 4 of the said Act reads as follows:

In order to justify recovery for violation of trade-mark rights in the preceding section defined, it shall not be necessary to show that the trade-marks had been registered under the royal decree of 1888, providing for registration for trade-marks in the Philippine Islands, in force during the Spanish sovereignty in these islands, nor shall it be necessary to show that the trade-mark has been registered under this Act. It shall be sufficient to invoke protection of his property in a trade-mark if the party complaining shall prove that he has used the trade-mark claimed by him upon his goods a sufficient length of time so that the use of the trade-mark by another would be an injury to him and calculated to deceive the public into

the belief that the goods of that other were the goods manufactured or dealt in by the complaining party.

The fact that both are authors of a fraudulent imitation of the trade-mark of a third person, one which was anterior to both of theirs, and was variously copied in order to sell as "La Campana" gin from Antwerp, those gins which the one and the other have offered the public under the trade-mark of "Dos Campanas" and "Tres Campanas," can not be considered res inter alios acta for the foundation of an action between the plaintiff and the defendant. The usurpation of a trade-mark by means of an imitation is punished by law, and this is what the plaintiff puts forward as his right of action against the defendant. The latter in turn, in answer to the plaintiff and for the purpose of denying his right of action, sets up the same charge of imitation, and supports his exception by offering in evidence the trade-mark that was imitated, substituted and originally usurped; the right of a third person is not contested except as a defense against the plaintiff and whatever is legitimate as cause of action is equally legitimate as a defense. If the action is a legitimate one, although the usurped trade-mark was not entered or registered, legitimate must also be the defense, although the mark usurped in turn by the complaining and injured party, may not have been recorded or registered. Therefore, there is no
229 injury to him who in turn damages another by the same kind of injury, or no action for usurpation can be maintained by one who in turn appears as guilty of identical usurpation; evidence to this effect with respect to an act relating to a third person is not res inter alios acta, but a necessary proof of the defense of the defendant. And, inasmuch as the provision of the law must be complied with, it is needless in order to decide this case to consider the other exceptions or defenses of the defendant; the lack of right of action stands foremost owing to its conclusive effect.

By virtue of the foregoing and on account of the circumstances as set forth, the judgment appealed from is hereby affirmed with the costs of this instance against the appellant.

Torres, Mapa, Carson and Willard, J. J., concur.

Judgment affirmed.

230 On February 24th, 1909, attorney for Plaintiff and Appellant excepted to the decision of the Supreme Court as follows:

(Title of Court and Cause.)

Comes now plaintiff and appellant in the above entitled cause and excepts to the decision of this Court, and prays the court to allow this exception as taken in due time and form.

Manila, February 23rd, 1909.

(Signed) KINCAID AND HURD,
Attorneys for Plaintiff and Appellant.

On the 25th day of February of the same year, the foregoing exception was allowed. Thereafter and on the first day of March, 1909, counsel for appellant presented the following motion for a rehearing, to wit:

(Title of Court and Cause.)

Now comes appellant in the above entitled case and prays this court to reconsider its decision therein and to grant a new trial for the following reasons:

1. Because the decision is contrary to the law.

2. Because said decision is not supported by the evidence of record.

3. The court erred in not holding that the trade-mark, as described in the complaint, was duly registered under the Spanish law before the ratification of the Treaty of Paris.

4. The court erred in hold- that appellant had no cause of action upon which to base the complaint in this case.

5. The court erred in considering as evidence the certificate issued in 1873 by the Spanish Minister of the Interior to Messrs. Van Den Bergh & Co. for the use of the trade-mark "Ginebra de Campana."

231 6. The court erred in holding that the trade-mark and seal used by the appellee has no resemblance or similarity to those of plaintiff, so as to induce the public to believe that the trade-mark and seal of appellant is that of appellee.

7. The court erred in holding that the registration by appellant of the trade-mark, as appears from Exhibit "A" did not justify plaintiff in using the trade-mark described in the complaint and that he is not protected by the law in the use thereof.

8. The said decision is contrary to the provisions of the Treaty of Paris and of the Act of Congress of July first, 1902.

9. The court erred in holding that neither by lack of registration of the trade-mark of Van Den Bergh & Co., nor by the expiration of the patent, can plaintiff be considered as authorized to use freely and with impunity the said trade-mark.

10. The court erred in holding that plaintiff's right to use the trade-mark "Tres Campanas" was not res adjudicata.

11. The court erred in not directing the appellee to indemnify plaintiff for the damages sustained by the latter on account of appellee's acts.

Manila, March 1, 1909.

(Signed) KINCAID & HURD,
Counsel for Appellant.

On March 2nd, 1909, the court overruled the foregoing motion for a new trial, and to the order of the court so overruling said motion, counsel for appellant duly excepted on the 4th day of March.

On March 10th, 1909, final judgment was entered in the Supreme Court as follows:

232 (Title of Court and Cause.)

The Court having regularly acquired jurisdiction for the trial of the above-entitled cause, which was submitted by both parties for decision, after consideration by the Court upon the record and proceedings, its decision and order for judgment having been filed on the 17th day of February, 1908;

By virtue of said order, the judgment of the Court of First Instance of Manila, from which the said appeal was taken dated September 28, 1907, is hereby affirmed, with costs of this instance against appellants.

It is further ordered that appellee recover from appellant the sum of P40.00 as costs.

Manila, P. I., March 10, 1909.

(Signed) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Thereafter, and on the 12th day of March, 1909, counsel for plaintiff and appellant excepted to the final judgment of the Supreme Court, which said exception was duly allowed by the Court on the same date.

233 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

CITY OF MANILA,
Philippine Islands, ss:

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing two hundred and thirty-two (232) pages of typewritten matter contain a true, complete, and correct translation and transcript of the record and proceedings in the above entitled cause, wherein Patricio Ubeda is plaintiff and appellant and Agapito Zialcita is defendant and appellee, the cause bearing No. 4392 of this Court; and in obedience to the order of the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, allowing an appeal in said cause, I hereby transmit the same to the said Supreme Court of the United States of America, sitting at Washington, D. C.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands this sixteenth day of April, one thousand nine hundred and ten (1910) A. D.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

234 Translation of petition for counsel for appellant and order of the Honorable Grant Trent, Associate Justice of the Supreme Court of the Philippine Islands, acting in vacation, directing

that the originals of certain exhibits be forwarded to Washington, D. C., under Section 1, Rule 8 of the Rules of the Supreme Court of the United States.

THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

PATRICIO UBEDA, Plaintiff and Appellant,
versus
AGAPITO ZIALCITA, Defendant and Appellee.

Comes now the plaintiff and appellant in the above-entitled cause and states to the court:

1. That an appeal has been allowed in this cause to the Supreme Court of the United States.

2. That there are several exhibits attached to the record which cannot be copied, and in order to send an exact copy of the record to the Supreme Court of the United States it will be necessary to forward the original exhibits which cannot be copied.

Wherefore, plaintiff and appellant prays that the Clerk be
235 directed to attach to the transcript such original exhibits as cannot be conveniently copied or described.

Manila, April 4, 1910.

(Signed) W. A. KINCAID,
Counsel for Plaintiff and Appellant.

Upon consideration of the foregoing petition, the same is hereby granted.

Manila, April 5, 1910.

(Signed) GRANT TRENT,
Associate Justice, Supreme Court, Acting in Vacation.

I hereby certify that the foregoing is a true and correct translation of its original on file in my office.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

236 PHILIPPINE ISLANDS,
City of Manila.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that S. C. Choy and Song Fo are to the best of my knowledge and belief amply solvent for the sum of Five Hundred Dollars and that I would approve such bond if the same were submitted to me for approval.

Manila, P. I., November 4, 1909.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Documentary Stamp, 20 centavos, Philippine Islands.

237 Know all men by these presents, That we, Patricio Ubeda of the City of Manila, Philippine Islands, as principal, and S. C. Choy and Song Fo, of the same place, as sureties, are held and firmly bound unto Agapito Zialcita, of the City of Manila, Philippine Islands, in the full and just sum of Five Hundred dollars, to be paid to the said Agapito Zialcita, his certain attorney, executors administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, successors, executors, and administrators, jointly anad severally by these presents. Sealed with our seals and dated this Fourth day of November, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a term of the Supreme Court of the Philippine Islands, in a suit depending in said Court, between the said Patricio Ubeda and the said Agapito Zialcita a judgment was rendered against the said Patricio Ubeda and the said Patricio Ubeda having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Agapito Zialcita citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 120 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Patricio Ubeda shall prosecute such appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

PATRICIO UBEDA.
By His Att'y, W. A. KINCAID. [SEAL.]
S. C. CHOY. [SEAL.]
SONG FO. [SEAL.]

Sealed and delivered in presence of—

——— ———.
——— ———.

Approved by—

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

238 UNITED STATES OF AMERICA, ss:

To Agapito Zialcita, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 120 days from the date hereof, pursuant to an order allowing appeal filed in the Clerk's Office of the Supreme Court of the Philippine Islands wherein Patricio Ubeda is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the

upreme Court of the United States, this thirty-first day of December, the year of our Lord one thousand nine hundred and nine."

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

39 On this 12 day of February, in the year of our Lord one thousand nine hundred and ten, personally appeared Joaquin Borja before me, the subscriber, George N. Hurd, a Notary public in and for the City of Manila, Philippine Islands and makes oath that he delivered a true copy of the within citation to Agapito Zialcita, in the said city of Manila on this 12 day of February, 1910.

JOAQUIN BORJA.

Ced. No. F 1531186, Manila, Ap. 23, 1909.

Sworn to and subscribed the 12 day of February, A. D. 1910.

[Seal Geo. N. Hurd, Notary Public, Manila, Islas Filipinas.]

GEO. N. HURD,
Notary Public.

My commission expires Dec. 31, 1910.

40 Supreme Court of the United States.

Patricio Ubeda, Appellant,
vs.
Agapito Zialcita, Appellee.

Petition for Allowance of Appeal.

Hon. Joseph McKenna, Associate Justice Supreme Court of the United States:

Comes Patricio Ubeda, the appellant in the above entitled cause and represents:

Plaintiff filed Bill of Complaint in the Court of First Instance of the City of Manila, against the defendant, to enjoin the latter's use of a device or trade-mark claimed by the plaintiff to be his registered property, and for an accounting and for damages.

In his Complaint the plaintiff averred:

"VII. Plaintiff had the said design and trade-mark duly registered in the office of the General Director of Civil Administration under the Spanish Government and on the 24th of December, 1898, the Governor-General of the Philippines issued to him a certificate of "ownership."

41 The trial court found against plaintiff and dismissed his complaint. On appeal, the Supreme Court of the Philippines affirmed the judgment below, rendering an opinion (Transcript 37-47) wherein that Court denied the validity of the trade-mark and registration, under which the plaintiff claimed, and thereon entered final judgment on March 10, 1909 affirming the judgment below. (Transcript p. 50.)

Article XIII of the Treaty of Paris provides:

"The rights of property, secured by copyrights and patents, a
" quired by Spaniards in the Island of Cuba, and in Porto Rico, t
" Philippines, and other ceded Territories, at the time of the e
" change of the ratifications of this Treaty, shall continue to be
" spected."

The Treaty was ratified by the exchange of ratifications on Ap
11, 1899.

The judgment of the Supreme Court of the Philippine Islands w
hence a denial of a right asserted under Article XIII of this Trea
because the plaintiff claims that that court failed to respect the rig
of property secured to him by the trade-mark patent issued to hi
by authority of the Spanish Government.

Section 10, of the Act approved July 1, 1902, to provide a te
porary government, etc., for the Philippines, provides:

"That the Supreme Court of the United States shall have jur
" diction to review, revise, reverse, modify, or affirm the final jud
" ments and decrees of the supreme court of the Philippine Islan
" in all actions, cases, causes, and proceedings now pending there
" or hereafter determined thereby in which the Constitution or a
" statute, treaty, title, right, or privilege of the United States is
" volved, or in causes in which the value in controversy exce
" twenty-five thousand dollars, or in which the title or possession
" real estate exceeding in value the sum of twenty-five thousand d
" lars, to be ascertained by the oath of either party or of other co
" petent witnesses, is involved or brought in question; and such fi
" judgments or decrees may and can be reviewed, revised, reverse
" modified, or affirmed by said Supreme Court of the United States
" appeal or writ of error by the party aggrieved, in the same manne
" under the same regulations, and by the same procedure,
242 " far as applicable, as the final judgments and decrees of t
" circuit courts of the United States."

The Bill of Complaint also avers in paragraph XIII:

"That defendant has sold in the manner above set forth a lar
" amount of gin under plaintiff's trade-mark and seal in a sum n
" less than P50,000 of which P10,000 has been profit obtained by d
" fendant and that, on the other hand plaintiff's sales of gin have d
" creased in the same amount of P50,000, he having been thus d
" prived of a profit of P10,000 which he would have obtained had h
" sold that much gin." (Transcript p. 6.)

And the relief demanded is, inter alia:

"That defendant pay to plaintiff double the amount of the procee
" of the gin sold by him in bottles with a trade mark and se
" similar to that of plaintiff, as an indemnity for the damages su
" fered by him on account of defendant's acts."

These averments show that the amount involved exceeds 50,00
pesos, or $25,000, and that hence the value of the matter in contr
versy is more than $25,000.

Wherefore, plaintiff and appellant prays that he be granted an a
peal from the Supreme Court of the Philippine Islands, to the S
preme Court of the United States, in order that the judgment may
reviewed by the Supreme Court of the United States upon the assig

ments of error presented with this petition and hereto annexed. He also prays that the record of the cause be ordered translated from Spanish to English, in conformity with the rule prescribed by the Supreme Court of the United States.

ALDIS B. BROWNE,
ALEX. BRITTON,
W. A. KINCAID,
Att'ys for Plaintiff & Petitioner.

On consideration of the foregoing petition, it is ordered that an appeal be allowed as prayed, upon giving bond in the sum of $500.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

243 Supreme Court of the United States.

PATRICIO UBEDA, Appellant,
versus
AGAPITO ZIALCITA, Appellee.

Assignment of Errors.

Comes the appellant and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

I.

The Supreme Court of the Philippine Islands erred in failing and refusing to consider the trademark as substantially described in the complaint was duly registered under the Spanish law prevailing in the Philippine Islands before the ratification of the Treaty of Paris, and hence was a right of property expressly protected by Article XIII of said Treaty.

II.

The Court erred in holding that the plaintiff and appellant has no cause of action in this case.

III.

The Court erred in considering as evidence the certificate issued in 1873 by the Ministerio de Fomento of Spain in favor of Messrs. Van Den Berg & Co. for the use of the trade-mark "Ginebra de la Campana."

244 IV.

The Court erred in holding that the registry by plaintiff and appellant of the trade-mark as [illegible] in Exhibit "A" did not justify the plaintiff and appellant in the use of the trademark described in the complaint and does not entitle him to the protection of the law in the use of said trade-mark.

'Tres Campanas' ('Three Bells'), which exhibit will be found at pages 61, 62, 63 and 69 of the first piece of the record of the Court of First Instance of Manila.

"3. That said Exhibit 'A' is of the utmost importance for the decision of the cause by the Supreme Court of the United States.

"By virtue thereof, the undersigned pray the Court to instruct the Clerk to send the said exhibit to the Supreme Court of the United States, duly translated into English, decreeing that the same form part of the record sent to Washington."

On October 16, 1912, the Supreme Court of these Islands passed the following resolution:

"After consideration of the petition presented by attorneys Kincaid, Hartigan & Lahesa, in cause No. 1392, Patricio Ubeda versus Agapito Zialcita, asking that the Clerk of this Court be instructed to send to the Supreme Court of the United States Exhibit 'A' of said record, duly translated into English, in order that it may form part of the record sent to said tribunal, the court said: Granted as requested, with the understanding that the petitioners shall pay any expenses occasioned by said remission."

PLAINTIFF'S EXHIBIT "A."

MARCA DE FABRICA
Para evitar la falsificacion nuestras etiquetas se hallan depositadas y firmadas en nuestra firma
MARCA DE TRES CAMPANAS
EXTRA SUPERIOR
PATRICIO UBEDA
MANILA

The Governor-General and Captain-General of the Philippine Islands.

Whereas Patricio Ubeda Gallego, a resident of Manila, has shown in due form, upon investigation, that he is the sole owner of the attached trademark on the wines imported by him in this market, known as "Tres Campanas" ("Three Bells").

Now, therefore, by virtue of the provisions of the regulations now in force with reference to trademarks, I hereby issue to him this title of ownership, entitling him to all the benefits therein set out from the 24th day of October of the present year, the date on which

his petition was registered in the General Registry together with the aforesaid trademark, and he may prosecute in the courts of justice anybody who may attempt to usurp it or to falsify his legitimate rights.

This title shall be attested by the Director of Civil Administration and the necessary notation will be made by the Bureau of Agriculture, Industry and Commerce, without which requisites it shall be of no force and effect.

Given at Manila on this 16th day of December, 1898.

The Governor-General.

(Signed) FRANCISCO RIGGO.

The Director-General.

(Signed) (Illegible) MONCADA.

Title of ownership of trademark issued in favor of Patricio Ubeda

(Indorsed on back as follows:)

Contents noted by the Bureau of Agriculture, Industry and Commerce under No. 8, page 3, of Registry Book No. 2, of Industrial and Commercial Trademarks.

Manila, December 21, 1898.

(Signed) ANTONIO ESCARTIN GARCIA.

(There is attached thereafter to this exhibit label bearing trademark in question, as follows:)

(Continuation of Plaintiff's Exhibit "A.")

I, Candido Cabello y Echenique, Chief of Administration of Third Class, Assistant Director and Disbursing Officer for the General Direction of Civil Administration of the Philippine Islands,

Do hereby certify: That on the 24th day of the present month,

at nine o'clock a. m., there was filed in this office by Patricio Ubeda Gallego a petition of the following tenor:

[On margin:] (Attached.) Stamp of the Tenth Class for 25 Centimos. "Made Valid for 1898-99."

"To His Excellency, the Director-General of Civil Administration.—Patricio Ubeda Gallego, a merchant, of age, with certificate of registration, respectfully states: That desiring to register in the Registry of Trademarks of this General Direction of Civil Administration a trademark of his own designated 'Tres Campanas' ('Three Bells'), and of which he begs to enclose the six copies required by law, he respectfully petitions Your Excellency to grant his request after the proceedings provided for by the present laws and regulations on the subject have been first had.—This is a grace which your petitioner has no doubt will obtain from the recognized goodness of Your Excellency, whose life God may preserve for many years.—Manila, October 22, 1898. (Signed) Patricio Ubeda."

And pursuant to the provisions of Article 26 of the Regulations Governing Trademarks, issued by the Secretary of the Colonies (Colonial Secretary) on the 26th day of October, 1888, I issue these presents at the request of the party in interest, duly vised by His Excellency, the Director-General, at Manila on this 25th day of October, 1898.

(Signed) CANDIDO CABELLO.

Vised:
The Director-General.
(Signed) (Illegible) MONCADA.

(There is attached to this document a specimen of the trademark "Tres Campanas" ("Three Bells") of Patricio Ubeda Gallego, as follows:)

Exactly the same as appears on page 4 of document and 2 of this Exhibit "A," it having been impossible to secure another seal to attach at this place.

There are attached to and constitute a part of the two preceding documents (Exhibit "A") five sheets of the so-called *"papel de reintegro"* (reimbursement paper, equivalent to receipt showing payment of fees due the government on account of this trademark) which are as follows:

"Series H. 5 Pesos Philippine Currency. 1898 & 99. No. 0,006,659. No. 1.

[SEAL.]

"Payments to the Government. 5 Pesos. Made valid for 1898-99."

Upper part to be delivered to the party in interest.

In payment of the fees for the trademark entitled 'Tres Campanas' ('Three Bells.')

Manila, 24th of December, 1898."

"Series H, 5 Pesos Philippine Currency. 1898 & 99. No. 0,006,660. No. 2.

[SEAL.]

"Payments to the Government. 5 Pesos. Made valid for 1898-99."

Upper part to be delivered to the party in interest.

In payment of the fees for the trademark entitled 'Tres Campanas' ('Three Bells.')

Manila, 24th of December, 1898."

"Series G, One Peso Philippine Currency. 1898 & 99. No. 0,022,818. No. 3.

[SEAL.]

"Payments to the Government. One Peso. Made valid for 1898-99."

Upper part to be delivered to the party in interest.

In payment of the fees for the trademark entitled 'Tres Campanas' ('Three Bells.')

Manila, 24th of December, 1898."

"Series G, One Peso Philippine Currency. 1898 & 99. No. 0,022,815. No. 4.

[SEAL.]

"Payments to the Government. One Peso. Made valid for 1898-99."

Upper part to be delivered to the party in interest.

In payment of the fees for the trademark entitled 'Tres Campanas' ('Three Bells.')

Manila, 24th of December, 1898."

"Series F, 50 Centimos Philippine Currency. 1898 & 99. No. 0,019,504. No. 5.

[SEAL.]

"Payments to the Government. 50 Centimos. Made valid for 1898-99."

Upper part to be delivered to the party in interest.

In payment of the fees for the trademark entitled 'Tres Campanas' ('Three Bells.')

Manila, 24th of December, 1898."

(Continuation of Exhibit "A.")

(Letter written by the Director-General of Civil Administration to Mr. Ubeda, as follows:)

"[SEAL.]

"Office of the Director-General of Civil Administration of the Philippine Islands.

"By virtue of a resolution dated the 5th instant, and upon consideration of the report of the Royal Society, and in conformity with the provisions of Section 27 of the Regulations of October 26, 1888, the undersigned (this General Direction) has seen fit to grant to you the title and ownership of the attached trademark denominated 'Tres Campanas' ('Three Bells') to be used upon the wines imported by you in this market upon payment of the necessary fees.

"All of which I take pleasure in communicating to you for your information and guidance.

"May God preserve your life for many years.

"Manila, 12th of December, 1898.

(Sgd.) "(Illegible) MONCADA.

(There is attached here an original Exhibit "A" sample of seal appearing on page 2 of this certified copy of Exhibit "A," p. 1 of document, it having been impossible to secure one to attach here.)

"Mr. Patricio Ubeda."

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

I, V. Albert, Clerk of the Supreme Court of the Philippine Islands, by virtue of the resolution of this Court dated October 16, 1912, granting the petition of counsel dated October 15, 1912, in case R. G. No. 4392 of this Court, correct translation of which appears on pages 1 and 2 hereof, hereby certify that pages 3 to 9, inclusive, hereof, contain a true and correct translation and transcript of Plaintiff's Exhibit "A" in Case R. G. No. 4392 of this Court, entitled Patricio Ubeda vs. Agapito Zialcita, the seals of the trademark thereto attached having been detached from the original exhibit by virtue of an order of Mr. Justice Trent of this Court dated April 5, 1910, it having been impossible to secure other copies of same at this time.

In witness whereof, I have hereunto set my hand and affixed the

seal of the Supreme Court of the Philippine Islands this 23rd day of October, 1912, A. D.

[Seal Corte Suprema, Islas Filipinas.]

V. ALBERT,
Clerk of the Supreme Court
of the Philippine Islands.

[Endorsed:] File No. 22,226. Supreme Court U. S., October Term, 1912. Term No. 77. Patricio Ubeda, Appellant, vs. Agapito Zialcita. Addition to Record. Filed Dec. 9th, 1912.

FILED.
SEP 9 1912
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 77.

PATRICIO UBEDA, APPELLANT,

vs.

AGAPITO ZIALCITA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR APPELLANT.

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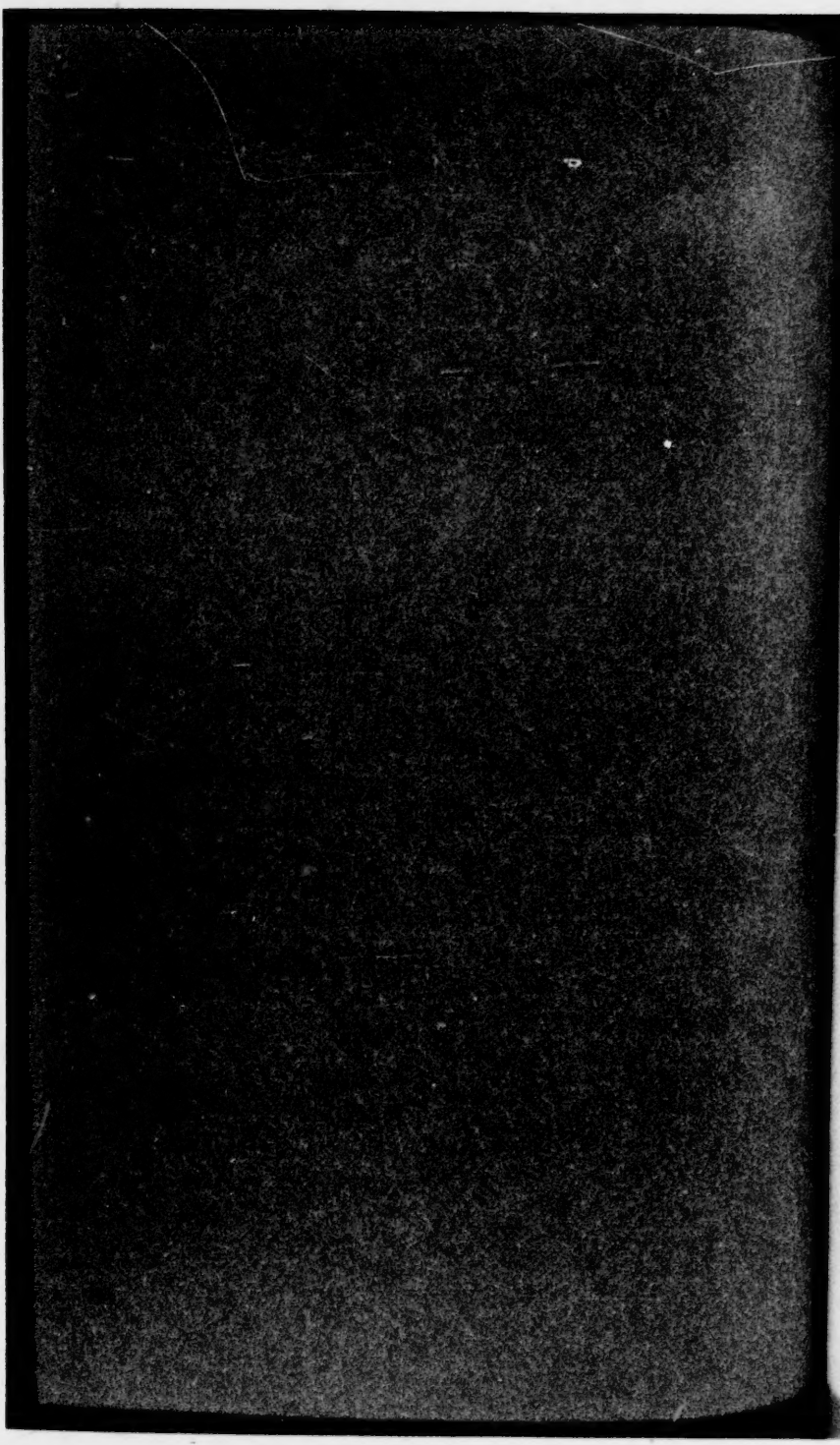

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 77.

PATRICIO UBEDA, APPELLANT,

vs.

AGAPITO ZIALCITA.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR APPELLANT.

Statement.

The parties to the suit are both liquor merchants of Manila, domiciled and resident therein (R., 1). On January 4, 1906, the plaintiff and appellant, Patricio Ubeda, filed a complaint against the defendant and appellee, Agapito Zialcita, under Act No. 666 of the Philippine Commission, approved March 6, 1903, in the Court of First Instance of the city of Manila, for an injunction and accounting, on the ground that the latter was infringing the

trademark of the former and was competing unfairly with him (R., 1-4). After a hearing, that court dismissed appellant's complaint (R., 8-18). Appellant thereupon appealed to the Supreme Court of the Philippine Islands, which court in turn affirmed the judgment of the lower court (R., 146-152), whereupon appellant appealed to this honorable court (R., 156-157). The material facts are as follows:

In accordance with appellant's petition of October 24, 1898, the Governor-General of the Philippine Islands issued to appellant, on December 16, 1898, a certificate of ownership of a trademark (R., 75-76) designed as follows (R., 1-2, 25):

Two concentric circles, the larger 50 and the smaller 33 millimeters in diameter, the latter eight millimeters distant from the former. In the upper part of the space between the two circumferences the words "Ginebra de Tres Campanas" (Three Bells Gin) are printed, and in the lower part of the same space the words "Patricio Ubeda," appellant's name. Within the inner circle is a design of three bells tied together at the top with a bow ribbon and the ears of some cereal, the ends of which hang over the two outer bells, and immediately below the bells are the words "Extra Superior." Appellant's signature and rubric is stamped in black ink diametrically across the two circles, commencing at a point over the first three letters of the word "Ginebra" and ending near the letter "p" of the word "Campanas." On the upper part and outside of the outer circle these words are printed in very small type: "Para evitar la falsificacion nuestras etiquetas se hallan depositadas y llevan nuestra firma," signifying, "To avoid imitations our labels are patented and bear our signature." On the lower outer part of the outer circle appears the word "Amberes."

This certificate was issued to appellant as importer of wines (Ex. "A," R., 75, and Ex. "12," R., 144). He originally intended to import gin from Amberes (Antwerp), bottle it in Manila, and label his bottles with the trademark

above described. Later he ceased importing gin and began distilling it himself in Manila. Thereupon he substituted "Manila" for "Amberes" on the trademark (R., 44). This is substantially the only difference between the trademark as originally registered and as later used by appellant. The trademark later used by appellant, together with the seal used by him, ~~are~~ shown in Exhibits "D" and "E" (R., 78, 80).

For some time previous to the filing of the complaint (R., 52) defendant and appellee, Agapito Zialcita, used a label on bottles containing gin manufactured by him, closely resembling that used by the appellant. The label used by appellee was not registered by him (Ex. "B," R., 79). The following is a description of the label used by appellee (R., 11):

Two concentric circles the same as in the trademark owned by appellant. Between the two circles the words "Ginebra de Dos Campanas" (Two Bells Gin), instead of "Ginebra de Tres Campanas," and "Gabino Barretto" instead of "Patricio Ubeda." In the inner circle are two bells instead of three. A facsimile of the signature of Gabino Barretto is stamped across the label instead of the signature of Patricio Ubeda. Around the larger circle the words "Para evitar," etc., appear, as in appellant's label, and below is the word "Manila." The outer edge of the label used by appellee is plain, whereas that of the label used by appellant is serrated.

The appellee claimed to have purchased the right to the label used by him from a Chinaman, Limiao Sim, and to have returned it to him again because he (appellee) thought the label on his bottles might be illegal (R., 68, 70).

To further distinguish his gin from that of all others, appellant, for some months prior to filing the complaint, used a special seal on his bottles, as shown in the lower parts of Exhibits "D" and "E" (R., 78, 80). Appellant's seal is constituted as follows (R., 2):

The upper and lower parts thereof "are formed by two semicircles joined by triangles, those attached to the semicircles being rectangular and those joining the said triangles, and which are somewhat larger than the others, being obtuse angles. This design or drawing consists of a band three millimeters in width entirely surrounding the design. Plaintiff's name is printed on the upper part of the design; in the center there appears the reverse and converse sides of a medal and on the lower part the words 'Primer Premio en la Esposicion de Hanoi, 1902-1903' (First Prize at the Hanoi Exposition, 1902-1903)."

Subsequently appellee began to use, on his bottles, a seal closely resembling that of appellant. The imitation used by appellee is shown in Exhibit "N" (R., 86). Appellant's and appellee's seals both have the same shape, border, and medal. Substantially the only difference between the seals is that appellee's has printed on it the name of Gabino Barretto, instead of that of appellant, and that instead of the words "Primer Premio en la Esposicion de Hanoi, 1902-1903," the words "Tarifa-A Inciso-1 Tasacion-5, Factura num . . ." appear below on the medal.

The seal and label used by appellee are printed in gold and red, as are appellant's seal and trademark.

Appellant ordinarily puts up his gin in square bottles, with his trademark blown in the shoulder thereof, near one of the corners and close to the neck. The trademark blown in the bottles does not contain the words "Para evitar," etc., as in appellant's trademark before described, and the words "Ginebra de Tres Campanas" and appellant's signature and rubric are also omitted therefrom (R., 2).

In putting up his gin for sale on the market appellee used bottles similar to those of appellant, with appellant's design or trademark blown thereon (R., 2-3).

Appellant also used lead caps covering the corks of his bottles, on the upper parts of which the words "Patricio Ubeda" appear. Appellee's bottles also had lead caps cover-

ing the corks, and thereon was printed a vine leaf without any words (R., 12).

All these points of similarity between appellant's product and that of appellee served to make it very difficult, if not impossible, for the ordinary consumer to distinguish appellant's gin from that of appellee, and enabled appellee to palm off his gin as that of appellant.

As shown in Exhibit "8" (R., 97), the Director-General of Public Works, Agriculture, Industry and Commerce of Spain issued a certificate, on December 11, 1873, to Van Den Bergh & Company, manufacturers of wines at Antwerp, granting them the use of the mark "Ginebra de la Campana" (Bell Gin) "within the Spanish territory and its insular possessions." This trademark (Ex. "3," R., 90) is constituted as follows:

> "A red bronze circle, with a representation of a bell in the center, in the upper part of which are seen two ears of corn fastened together with a bow of ribbon. Immediately under the bell the words 'Extra Superior' are inscribed, and across the label in black ink there appear the words 'Van Den Bergh & Co.' Around the circle and within a smaller circle formed by two curved lines the words 'Ginebra de la Campana—Van Den Bergh & Co.' are inscribed, and on the outside of the said circle and displayed in the same manner the following words appear in Spanish 'Para evitar la falsificacion nuestras etiquetas se hallan depositados y llevan nuestra firma—Amberes.'"

This trademark was registered in the United States Patent Office on April 25, 1876, for thirty years (Ex. "9," R., 98-100). It was registered in the Division of Archives, Patents, Copyrights and Trademarks, Philippine Islands, in November, 1903 (Ex. "10," R., 100-101), because no record could be found of the registration of the trademark "Tres Campanas" and because it had already been registered in the United States (R., 67).

The lower court dismissed appellant's complaint (R., 8-18) on these grounds:

(1) That the trademark used by appellant was not identical with the one registered by him;

(2) That there was not a sufficient resemblance between the trademark of appellant and the label of appellee to constitute the latter an infringement of the former nor sufficient similarity in the dressing of appellee's gin and that of appellant's to satisfy the requirements of the law of unfair competition, as was shown by (*a*) a comparison of the labels, seals, caps, and general dressing of the two gins; (*b*) the absence of any evidence showing that appellee's gin had been confused by the consuming public with that of appellant; (*c*) the presence on the market of gin labeled with from one to five bells;

(3) That there was no evidence of an intention on the appellee's part to deceive the public or defraud appellant;

(4) That the suit should have been brought in the name of the manager of the firm, Tuason, Legarda & Co., in which appellant had a share, and which paid the internal-revenue license for the use of the trademark belonging to appellant.

The Supreme Court of the Philippine Islands affirmed the judgment of the lower court (R., 146-152) on these grounds:

(1) That the trademark used by appellant was not identical with the one registered by him;

(2) That Van Den Bergh & Co. were the owners of the Bell Gin trademark;

(3) That appellant's trademark was a falsification of that of Van Den Bergh & Co., and, under section 9 of Act No.

666, the conduct of appellant precluded him from obtaining the protection of the courts for his trademark.

To revise the judgment of the Supreme Court of the Philippine Islands the pending appeal was taken. The jurisdiction of the court over the cause arises primarily under article XIII of the Treaty of Paris, ratified on April 11, 1899 (30 Stats., p. 1760), and which provides:

> "The rights of property secured by copyrights and patents, acquired by Spaniards in the Island of Cuba, and in Porto Rico, the Philippines, and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected."

In his complaint the plaintiff and appellant averred (Rec., 2):

> "VII. Plaintiff had the said design and trademark duly registered in the office of the General Director of Civil Administration under the Spanish Government and on the 24th of December, 1898, the Governor General of the Philippines issued to him a certificate of ownership."

The judgment of the Supreme Court of the Philippine Islands was hence a denial of a right asserted under article XIII of this treaty, because the appellant claims that by such judgment that court failed to respect the right of property secured to him by the trademark patent issued to him by authority of the Spanish Government.

Section 10 of the act approved July 1, 1902, to provide a temporary government, etc., for the Philippines, provides:

> "That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pend-

> ing therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

32 Stats., Part I, p. 695.

The bill of complaint also avers in paragraph XIII:

> "'That defendant has sold in the manner above set forth a large amount of gin under plaintiff's trademark and seal in a sum not less than P50,000 of which P10,000 has been profit obtained by defendant and that, on the other hand plaintiff's sales of gin have decreased in the same amount of P50,000, he having been thus deprived of a profit of P10,000 which he would have obtained had he sold that much gin' (R., 3).

And the relief demanded is, *inter alia*:

> "'That defendant pay to plaintiff double the amount of the proceeds of the gin sold by him in bottles with a trademark and seal similar to that of plaintiff, as an indemnity for the damages suffered by him on account of defendant's acts" (R., 4).

These averments show that the amount involved, including the value of the trademark, exceeds 50,000 pesos, or

$25,000, and that hence the value of the matter in controversy is more than that sum.

The errors assigned are as follows (R., 159-160):

Assignment of Errors.

I.

The Supreme Court of the Philippine Islands erred in failing and refusing to consider the trademark as substantially described in the complaint was duly registered under the Spanish law prevailing in the Philippine Islands before the ratification of the Treaty of Paris, and hence was a right of property expressly protected by article XIII of said treaty.

II.

The court erred in holding that the plaintiff and appellant has no cause of action in this case.

III.

The court erred in considering as evidence the certificate issued in 1873 by the Ministerio de Fomento of Spain in favor of Messrs. Van Den Bergh & Co. for the use of the trademark "Ginebra de la Campana."

IV.

The court erred in holding that the registry by plaintiff and appellant of the trademark as appears in Exhibit "A" did not justify the plaintiff and appellant in the use of the trademark described in the complaint and does not give him the protection of the law in the use of said trademark.

V.

Said judgment is in violation of the Philippine bill and of article XIII of the Treaty of Paris in this, that it refuses appellant the protection of a trademark issued by the competent Spanish authority in the Philippine Islands prior to the ratification of the Treaty of Paris, thereby impairing the property and rights which by law belong to the peaceful possession of property in said Islands.

VI.

The court erred in holding that neither because of the failure of Van Den Bergh & Co. to register the trademark nor because of the lapse of the patent for its use, can the plaintiff and appellant be considered to have authority to use said mark freely and with impunity.

VII.

The court erred in holding that the right of the plaintiff and appellant to use said trademark of "Tres Campanas" is not *res adjudicata*.

VIII.

The court erred in refusing to require the defendant and appellee to indemnify the plaintiff and appellant for the damages occasioned to him by the acts of said defendant and appellee.

ARGUMENT.

THE FIRST SUBSTANTIAL QUESTION RAISED BY THE ERRORS ASSIGNED IS: WAS THE APPELLANT, AT THE TIME OF THE FILING OF THE COMPLAINT, THE OWNER OF THE THREE BELLS GIN TRADEMARK, AND AS SUCH ENTITLED TO THE PROTECTION OF THE COURTS AGAINST AN IMITATION OF THAT TRADEMARK BY APPELLEE?

Appellant contends that the record shows that he was the owner of the "Tres Campanas" trademark when his complaint was filed, and was, therefore, entitled to have his trademark protected under Act No. 666 of the Philippine Commission, approved March 6, 1903.

I.

The trademark used by appellant and the one registered by him in 1898 are substantially the same. The only differences are these:

(*a*) On the out-side of and below the outer circle of the registered trademark is the word "Amberes," whereas the word "Manila" is substituted therefor in the mark as used by appellant. This alteration was thus explained by appellant at the trial (R., 44):

> "I ordered gin from Amberes in barrels for the purpose of having the same bottled here in Manila, and it was for this reason that the first trademark was prepared. But in view of the fact that the prices were not satisfactory and that the gin become colored, we stopped importing gin in barrels and decided to prepare the stuff here ourselves."
>
> * * * * * * *
>
> "Formerly the label read 'Amberes' but now I have substituted the word 'Manila' in small letters, as you can see from the label itself."

(*b*) The outer edge of the registered mark is plain, whereas that of the mark used by appellant is serrated (R., 12).

(*c*) The gold coloring of the registered trademark is of a slightly different shade of gold from that of the mark later used by appellant (R., 10).

It is submitted that these points of difference are immaterial and that the mark registered by appellant and that used by him should be considered to be legally the same and to be entitled to the same protection. The points of similarity between the registered mark and the mark used by appellant are these:

(*a*) Both have the same general shape and appearance, and are of the same size;

(*b*) Both have the two concentric circles;

(*c*) Both have the three bells tied together at the top with a bow-ribbon, and the ears of some cereal, whose ends hang over the outer bells, and below the bells the words "Extra Superior," all within the inner circle;

(*d*) Both have the words "Ginebra de Tres Campanas" and "Patricio Ubeda" in the space between the two circles;

(*e*) Both have the signature of Patricio Ubeda stamped across them;

(*f*) Both have the words "Para evitar," etc., around the outer circle.

The distinctive features of appellant's mark are the three bells and the name "Ginebra de Tres Campanas." These appear both upon the registered mark and upon the mark later used by appellant.

The immateriality of the changes made by appellant in his trademark is shown by the fact that the alterations were made in respect to matters as to which it is impossible to acquire trademark rights. The changes were in the form and color of the mark and in the geographical name employed.

It is well settled that form, color, and geographical terms are not the subject of trademark property.

The following authorities hold that there can be no trademark right in form or color:

28 *Am. & Eng. Encyc.* (2d ed.), 364.
Hopkins, Trademarks (2d ed.), sec. 95.

(*a*) Form:

Fairbanks vs. Jacobus, 14 Blatch., 337; 8 Fed. Cas., 951.
Adams vs. Heisel, 31 Fed. Rep., 279, 280.
De Long Hook, etc., Co. vs. Francis Hook, etc., Co., 118 Fed. Rep., 938, 939.
Regensburg & Sons vs. Juan F. Portmondo Cigar Mfg. Co., 136 Fed. Rep., 866, 869.
Dunkley Celery & Preserving Co., ex parte, 84 O. G., 310.
In re Hanson, 37 Ch. D., 112.

In *Fairbanks vs. Jacobus, supra*, the court said:

> "* * * but exterior form, painted color and such non-essentials, were not, and could not be the subject of the patents, and did not, and could not secure these to the plaintiffs. Much less could these be secured as a trademark, for, a trademark is always something indicative of origin or ownership, by adoption and repute, and is something different from the article itself which the mark designates."

And again:

> "Any other doctrine is impossible to be maintained, for otherwise all the colors, all the unessential forms, could be monopolized as trademarks, and exclusive rights would be created, not limited in time, as patents are, founded upon no public utility, and subject to no control but the will of the adopter."

In *E. Regensburg & Sons vs. F. Portmondo Cigar Mfg. Co., supra*, this doctrine is thus stated:

> "Certainly the color alone could not be appropriated by the complainant as a trademark, nor the shape alone, nor the material alone; and even the combination of these three elements could not make a valid trademark, because neither singly nor in combination do they point to the complainant as the source from which the goods are derived."

(*b*) Color:

Fleischmann vs. Starkey, 25 Fed. Rep., 127, 128.
Mumm vs. Kirk, 40 Fed. Rep., 589, 590.
N. K. Fairbanks Co. vs. R. W. Bell Mfg. Co., 71 Fed. Rep., 295, 298.
Lalance, etc., Mfg. Co. vs. National Enameling Co., 109 Fed. Rep., 317, 318.

In *Fleischmann vs. Starkey, supra* (p. 127), the court said:

> "The position is taken by the complainants that the essential part of their trademarks consists of a label having a yellow color, and that, therefore, they cover all yellow-colored labels used upon compressed yeast, and that the use by the defendant of a yellow-colored label upon the compressed yeast made and sold by him constitutes an unlawful imitation of their trademarks."

And at page 128:

> "The color of a label, apart from a name or device, can hardly be the subject-matter of a trademark."

That the Spanish law is in accord with the above is shown by article 2 of the royal decree of September 1, 1888, requiring applicants for registration of trademarks to submit cuts of their trademarks with their applications, which reads:

> "Since a mark does not consist of its dimensions or colors, the plate, which shall be printed in black, must be of a maximum width of six centimeters, and of a maximum length of ten centimeters."

The following authorities hold that there can be no trademark property in a geographical name:

Canal Company vs. Clark, 13 Wall., 311, 324.
Brown Chemical Co. vs. Meyer, 139 U. S., 540, 542.
Columbia Mill Co. vs. Alcorn, 150 U. S., 460, 464.
Connell vs. Reed, 128 Mass., 477.
Glendon Iron Co. vs. Uhler, 75 Pa. St., 467.
Laughman's Appeal, 128 Pa. St., 1.

In *Canal Co. vs. Clark*, *supra*, Mr. Justice Strong said:

> "And it is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies."

The immateriality of the changes made by appellant in his trademark is further evident from the following considerations: In protecting a plaintiff's trademark the courts enjoin a defendant from using not only a trademark identical with that of the plaintiff, but also one which resembles that of the plaintiff to an extent that is calculated to lead to error on the part of retail purchasers (cases, both Spanish and American, to this effect are cited later on in the brief); in so doing, the courts recognize that the plaintiff has a property right not only in the precise mark he has regis-

tered and uses, but also in all trademarks that are substantially similar thereto; it follows that as long as the changes which a plaintiff makes in his trademark do not alter the mark in substance, such changes cannot result in a loss of his property in the trademark. Applying this test to the present case, we may suppose that appellant used the trademark as registered by him without any change whatsoever, and that some third party had used the trademark as altered by appellant in the instant case. The question then is: Would such third party be liable as an infringer? Clearly, he would be. Applying the converse test, we may suppose that appellant had used the precise mark registered by him and that some third party had used a mark with the changes appellant actually made, but in all other respects *different* from appellant's mark. Clearly, such a mark would not be an infringement of appellant's registered mark.

Viewed from these standpoints, the alterations made by appellant in his trademark, appellant submits, are legally immaterial and hence should not have been regarded as controlling by either of the courts below.

The fact that the certificate of ownership issued to appellant was issued to him as an importer (Exhibits "A" and "12," R., 75 and 144, respectively) is of no consequence. This matter is merely *descriptio personæ*. The purpose of the mark was to distinguish the gin sold by appellant from all other gin on the market, and not to indicate the capacity in which appellant was dealing in gin. That such was the law in the Philippines at the time appellant registered his trademark is shown by the following from the royal decree of October 26, 1888 (*Colección Legislativa de España*, 1888, v. 141, p. 1239):

> "ART. I. Those are marks of manufacture, commerce and agriculture: The names of the manufacturers, merchants, farmers, or companies formed by the same, the denominations, emblems, shields, engravings, vinettes, marks, stamps, seals, reliefs, letters, figures, envelopes, wrappers or sacks, what-

ever may be their class and form, which enable the manufacturer, farmer, or company by them formed to designate his products or merchandise *in order that the public may know them and distinguish them, without confusing them with others.*"

That such is also the settled law laid down by the courts of this country appears from the following:

"A trademark is defined to be the name, symbol, figure, letter, form, or device, used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result from a reputation for superior skill, industry, or enterprise."

Larrabee vs. Lewis, 67 Ga., 561.

"The function of a trademark is to indicate to the public the origin, manufacture, or ownership of articles to which it is applied, and thereby secure to its owner all benefit resulting from his identification by the public with articles bearing it."

Dennison Manufacturing Company vs. Thomas Manufacturing Company, 94 Fed. Rep., 651.

"The office of a trademark is to point out distinctively the origin or ownership of the article to which it is affixed, or in other words to give notice who was the producer." Per Mr. Justice Strong, in *Canal Co. vs. Clark*, 13 Wall., 311, 322.

II.

Even should the court decide that the mark used by appellant is not substantially the one registered in December, 1898, appellant is none the less entitled to have his mark protected.

Section 4 of Act No. 666 of the Philippine Commission, approved March 6, 1903, reads as follows:

> "In order to justify recovery for violation of trademark rights in the preceding sections defined, it shall not be necessary to show that the trademarks have been registered under the royal decree of 1888, providing for registration of trademarks in the Philippine Islands, in force during the Spanish sovereignty in these islands, nor shall it be necessary to show that the trademark had been registered under this act. *It shall be sufficient to invoke protection of his property in a trademark if the party complaining shall prove that he has used the trademark claimed by him upon his goods a sufficient length of time so that the use of the trademark by another would be an injury to him and calculated to deceive the public into the belief that the goods of that other were the goods manufactured or dealt in by the complaining party.*" (Italics ours.)

The evidence in the case shows that appellant used the altered mark for many years prior to the time when he filed his complaint in this case; that appellant's Three Bells brand was the best known of all the bell brands, and that there was more demand for it than for any other (R., 30-31, 60-61). It should be noted, too, that, excepting only the One Bell brand of Van Den Bergh & Co., there was no evidence that any of the bell trademarks other than appellant's was registered anywhere at all, and that appellant's alone was proved to have been duly registered in the Philippines.

III.

Assuming, then, that the mark used by appellant was substantially the one registered by him in December, 1898, the question arises as to whether or not that registration by appellant was regular and lawful so as to invest him with legal title to the mark. To show that the registration was not lawful, appellee was permitted to introduce in evidence over objection (R., 62-63) a copy of the certificate issued at Madrid, on December 11, 1873, by the Minister of the In-

terior of Spain, to Messrs. Van Den Bergh & Co., of Antwerp, Belgium, authorizing the latter to use the One Bell mark previously described "within the Spanish territory and its insular possessions."

The court also admitted evidence (R., 63, 64) showing (1) that the above-described trademark was registered in the United States Patent Office on April 25, 1876, to remain in force for thirty years (see Ex. "9," R., 98); (2) that it was again registered in November, 1903, in the Division of Archives, Patents, Copyrights and Trademarks, Executive Bureau, Philippine Islands (Ex. "10," R., 100-101); (3) that on January 12, 1893, the Tribunal of First Instance at Madrid enjoined Messrs. Blankenheym and Nolet from using "the trademark of 'The Bell' in Spain and in its foreign possessions," and that this decree was affirmed on June 28, 1893, by the Second Tribunal of Appeal, Madrid (R., 129).

Appellant contends and assigns as Error No. III (R., 159), that the admission of this evidence was improper for the following, among other reasons:

(1) Neither of the parties to the suit derived any right from the mark of Van Den Bergh & Co., and the above evidence was, therefore, *res inter alios acta;*

(2) The mark of Van Den Bergh & Co. was not valid in the Philippine Islands at the time of appellant's registration, and therefore could not, under the royal decree of October, 1888, and article XIII of the Treaty of Paris, ratified April 11, 1899, be given precedence over that of appellant.

(3) Appellant's certificate of registration of the Three Bells mark was entitled to conclusive effect under section 14 of act No. 666, which provides,

> "Certificates of registration of trademarks and trade-names under the Spanish sovereignty in these islands, unannulled under the royal decree of eighteen hundred and eighty-eight, shall be conclusive evidence of the exclusive right of ownership of such trademarks or trade-names in respect to the goods and articles of merchandise or the business, profession, or occupation to which they by the terms of the registration apply."

The first two reasons are interrelated and will be considered together.

The third reason, appellant submits, is controlling, and had it been given any effect at all by the court, would have precluded absolutely the admission of any evidence whatsoever bearing upon the rights of Van Den Bergh & Co. to the One Bell mark. However, appellant submits that there is no basis either in law or in fact for the contention of the court, that appellant was not the lawful owner of the Three Bells mark because of Van Den Bergh & Co.'s right to the One Bell mark.

Appellant claims the right to the mark used by him by virtue of the certificate issued to him by the Philippine authorities on December 16, 1898. Appellee, on the other hand, traced his right to the "Dos Campanas" mark through purchase from a Chinaman, Limiao Sim (R., 68). Hence, neither party claimed to derive any title from Van Den Bergh & Co. Notwithstanding this, the Supreme Court of the Philippine Islands held that this evidence was properly admitted, and was competent to show an intention on appellant's part so to label his goods as to deceive the public, hence preventing appellant, under section 9 of Act No. 666, from obtaining the relief prayed for. The court said (R., 151):

> "But under sec. 9 of Act No. 666:
>
> "'No action, or suit, or criminal prosecution shall be maintained under the provisions of this act * * * in any case where the trademark, trade-

name, or the indicia of origin, ownership, or manufacture have been used by the complaining and injured party for the purpose of himself deceiving the public with respect to the character of the merchandise sold by him or of the business or profession or occupation carried on by him.'

"This is one of the defenses utilized by the defendant so far as he alleged that a party who had imitated the trademark of another could hardly be entitled to bring an action for an imitation of his own trademark. If, as claimed by the plaintiff, the mark 'Dos Campanas,' used by the defendant, is an imitation and variation of his own trademark 'Tres Campanas,' it is illegitimate and illegal, and the conduct of the author of said imitation is deceitful and fraudulent, and subject to an action for unlawful competition; it follows that the mark 'Tres Campanas,' of the plaintiff, being an imitation and a variation of the mark 'La Campana' of Van Den Bergh & Co., is also illegitimate and illegal, and the conduct of the plaintiff is in turn deceitful and fraudulent and subject to an action for unlawful competition. And being deceitful and fraudulent, that is to say, inasmuch as the petitioner, who claims to be the injured party, made use of the mark 'Tres Campanas' for the purpose of deceiving the public with respect to the character of the merchandise sold by him, pretending under the title of ownership produced in evidence, to cause it to pass as imported from Antwerp when it was manufactured in Manila, as he testified in this case, he cannot, under the provisions of said section 9, exercise any right of action or sue for what he claims in his complaint."

The charge contained in the latter part of the above-quoted passage is not substantiated by the evidence. On the contrary the record shows that appellant changed the geographical name on his trademark as soon as he ceased importing gin and began distilling it in Manila (R., 44).

Appellant submits that the holding of the Supreme Court of the Philippine Islands in the above-quoted passage is

erroneous, because at the time of the ratification of the Treaty of Paris, he (appellant) was, under Spanish law, prevailing in the Philippines, the lawful owner of the Three Bells mark, and his property in said trademark was expressly protected by article XIII of said treaty.

Spanish trademark law owes its inception to the royal decree of November 20, 1850 (*Colección Legislativa de España*, 1850, v. 3, p. 319). The One Bell mark of Van Den Bergh & Co. was registered in Spain on December 11, 1873, and the certificate issued authorized that company to use said trademark "within the Spanish territory and its insular possessions" (Ex. "8," R., 97-98). This registration was effected in pursuance of a special royal decree of August 14, 1873 (*Colección Legislativa de España*, 1873, v. 2, p. 204), which decree was in turn published to carry into effect article 5 of the Treaty of Commerce and Navigation between Belgium, the domicile of Van Den Bergh & Co., and Spain, ratified at Madrid February 12, 1870 (*Colección de los Tratados—España*, v. 6, 1868-1874). Article 5 provides:

> "Spaniards in Belgium and Belgians in Spain and its colonies shall enjoy the same protection as nationals as concerns the matter of property in trademarks or industrial models of all kinds."

In addition, article 5 specifies the formalities that must be observed in order to secure a certificate of the ownership of a trademark.

From the royal decree of August 14, 1873, it appears that the house of Van Den Bergh and other foreign firms had failed to comply strictly with the royal decree of November 20, 1850, notwithstanding the fact that they were using trademarks in Spain. The first-mentioned decree went on to provide that a certificate should issue to the house of Van Den Bergh as soon as it proved that it was the owner of the trademark, claimed by it, in Belgium, and complied with the formalities prescribed in article 5 of the above-mentioned treaty. Hence the registration of the

trademark of Van Den Bergh & Co. was virtually under the royal decree of November 20, 1850, the basic trademark law in Spain at that time. Any other construction of the facts outlined above would contravene the principle of reciprocity established by the above-quoted portion of article 5 of the treaty between Belgium and Spain.

It is a fundamental provision of Spanish juri-prudence that the laws of Spain do not *ex proprio vigore* extend to its colonies unless made extensive thereto by special regulations of the Colonial Secretary. This principle of Spanish jurisprudence has been embodied in all the constitutions of Spain. Article 80 of the Spanish Constitution of May 23, 1845, in force at the time of the publication of the royal decree of November 20, 1850, provides:

> "The colonial provinces shall be governed by special laws" (*Alcubilla, Diccionario de la Administración Española* (1895), v. 3, p. 339).

The constitution of June 30, 1876 (*ibid.*, p. 361), contains the same provision (Art. 89) with this explanatory amplification:

> "But the government is hereby authorized to apply to the colonies, with such modifications as it may deem proper, the laws promulgated or that may be promulgated for the peninsula, advising the Cortes thereof."

At the time the firm of Van Den Bergh & Co. secured its trademark certificate in Spain the royal decree of November 20, 1850, had not been extended to the Spanish colonies in general, nor to the Philippines in particular. Nor had any trademark law specially applicable to the Philippines been promulgated. In view of these facts, and of the further fact that Spanish trademark law is dependent wholly upon statutes (royal decrees) and a body of trademark law such as is embraced in what we know as the common law of trademarks is unknown to Spanish jurisprudence, it

follows that at the time when Van Den Bergh & Co. secured its certificate it was a legal impossibility for even a Spaniard to acquire trademark property in the Philippines. Under that portion of article 5 of the treaty between Belgium and Spain, previously quoted, Belgian subjects were entitled to the same trademark rights in Spain and its colonies that Spaniards enjoyed there, but to no more. Hence Van Den Bergh & Co. could not at that time acquire the property right in a trademark in the Philippines. Therefore, the certificate issued to Van Den Bergh & Co. by the Director-General of Public Works, Agriculture, Industry, and Commerce, in so far as it purported to give that company the right to the Bell trademark in the Philippines as one of the insular possessions of Spain, was absolutely void, and Van Den Bergh & Co. acquired no rights thereunder in the Philippines.

But even admitting that the certificate gave Van Den Bergh & Co., as it purported to do in general terms, the legal right to exploit its trademark in the Philippines, that firm lost whatever property right it may have had in the Philippines in the Bell gin trademark by failing to register in accordance with the provisions of the royal decree of October 26, 1888 (*Colección Legislativa de España*, 1888, v. 141-2—p. 1239) establishing the trademark law for the Philippines.

The following provisions of the royal decree of October 26, 1888, *supra*, show the importance of registration thereunder and demonstrate that the failure to effect such registration prevented the acquisition or continuance of property in trademarks in the Philippines.

> "ART. 21. The ownership of trademarks recognized by this decree shall be acquired by the certificate herein provided for and the compliance with all other provisions of the present decree."
>
> "ART. 7. No one shall have the right to enforce the ownership of trademarks, designs, or industrial models, if he is not provided with the proper cer-

tificate obtained according to the dispositions of this decree or to those of the decree of the 4th of January, 1884."

These provisions show that the trademark law applicable to the Philippines was attributive, *i. e., that the issuance of certificate of ownership operated as a grant of the property right in the trademark and was not merely declaratory of a right already existing by virtue of priority of use of the mark.* In this respect the trademark law applicable to the Spanish peninsula and that in force in the colonial possessions in 1888 are sharply differentiated, for the royal decree of November 20, 1850, *supra,* was not an attributive but a declaratory law. Says Estasén, the learned Spanish commentator on Spanish mercantile law, in his *Instituciones de Derecho Mercantilo,* v. 6, p. 129:

"The certificates issued by the public administration in accordance with the provisions of the royal decree of November 20, 1850, go no further than to grant possession as a means of acquiring property; their issuance does not create the title of ownership (dominio) for the question of actual ownership can be determined only by recourse to the courts in an action brought before them regarding the ownership of the mark, as is shown by the opinion rendered by the royal decreto *Sentencia of November* 22, 1880. *The legislation applicable to the Spanish colonies (ultramar), more progressive and complete than that in force in the peninsula, has the effect of conferring property in the trademark upon the issuance of the certificate.* Important consequences result from these different principles which characterize each set of legislation, for, as Perez Dindurra remarks, while in the peninsula the use of unregistered marks is permissible, since the inscription of marks may be effected by the one using them, but there is no obligation resting upon him to register his mark other than the embarrassment which results in not being able to prosecute infringers either civilly

"or criminally, *in the colonies, on the other hand,*
"*the registration of these marks is obligatory, so*
"*much so that they cannot be used there without a*
"*previous registration and he who attempts to use*
"*unregistered marks is subject to a legal penalty.*"

To like effect see pages 135 and 136, *ibid.*

The following from the *Sen. November* 22, 1880 (Sala de lo Contenciosa del Consejo de Estado) Jurisprudencia Administrativo, v. 32, p. 100, supports the contention of Estasén that the trademark law of the peninsula of Spain was declaratory and not attributive:

"Inasmuch as anyone is free to designate the
"products of his industry with such distinguishing
"mark as he may deem best, provided it does not
"contain any insignia of official authority and is
"not offensive to public decency, the administrative
"certificate referred to in the royal decree of Novem-
"ber 20, 1850, is an official document which au-
"thenticates and evidences that the holder thereof
"is the exclusive owner of the trademark adopted,
"*but such certificate is not in the nature of a grant,*
"*but is merely an administrative authorization.*"

The Philippine Commission impliedly recognized the fact that the trademark law in force in the Philippines, under Spanish sovereignty there, was attributive in providing, in section 14 of Act No. 666, that certificates of registration of trademarks under Spanish sovereignty in the islands, unannulled under the royal decree of 1888, should be conclusive evidence of the exclusive right of ownership of such trademarks, notwithstanding the fact that the last sentence of the very next section provides:

"But registration of trademarks and tradenames
"under this act shall only be *prima facie* evidence
"of the exclusive right by the person securing the
"registration to use the same."

Applying the above principles to the facts of the instant case, these three important deductions follow:

(*a*) That admitting that the certificate issued to Van Den Bergh & Co. in 1873 conferred upon them some legal rights in the Philippines under the royal decree of November 20, 1850, all that they thereby acquired was a right to use their trademark in the Philippines.

(*b*) That the failure of Van Den Bergh & Co. to register their trademark in the Philippines prevented them from acquiring *the actual ownership* of the trademark there, since according to the above authorities property in a trademark could be acquired only by registration under the attributive trademark laws in force there.

(*c*) That appellant's registration of the Three Bells mark in the Philippines under the royal decree of October 26, 1888, in force there, conferred upon him the property right in said mark, since under the above authorities the issuance of the certificate to him amounted to a grant of trademark property and was not merely declaratory of a right that he might have acquired or might thereafter acquire by using said mark.

Coming now more particularly to the provisions of the royal decree of October 26, 1888, appellant submits the following as showing that this decree made obligatory the registration of all marks whether a certificate had been obtained therefor previously or not:

> "ART. 4. All manufacturers, merchants, agriculturists, or business men of any other class who individually or collectively wish to use a mark to distinguish the products of their own production, etc., from all others of the same kind, *and those who wish to retain the ownership under provisions of present decree*, must solicit a certificate of property according to the prescriptions of this decree.
>
> "*Those who should fail to provide themselves with said certificate shall have no right to use any mark to distinguish the products of their industry or prevent other parties from using their stamps, industrial drawings, or models.*"

The language here "must solicit" is mandatory or obligatory. The plain meaning is that a failure to procure the certificate will cause a forfeiture of the right to use a trademark.

Article 46 provides:

> "Manufacturers, merchants, agriculturists, or companies by them formed, who are using any mark, design, or industrial model, without having obtained the corresponding certificate of property, must solicit it within the term of ninety days, to be counted from the publication of this decree, and they must abide by the provisions of the same."

Here, again, the language is mandatory.

Article 47 provides:

> "The registration of marks made in strict accordance with the decree of the 4th of January, 1884, shall be valid for the effects of article 12 of this decree."

Article 12 provides that the holder of a certificate may prosecute infringers civilly and criminally and may oppose the issuance of certificates to others for marks which resemble his sufficiently to deceive the purchaser. This in terms of the remedies granted the holder of a certificate under the decree of January 4, 1884, declares him to be the owner of his trademark for purposes of the decree of October 26, 1888. On the general principles of statutory construction that *inclusio unius est exclusio alterius*, 11 Coke, 58, registration under no other decree would confer these rights. Hence, though Van Den Bergh & Co. may have secured some sort of a legal right to their mark in the Philippines by virtue of the registration of their mark in Spain under the royal decree of November 20, 1850, their failure to register under the decree of January 4, 1884, or of October 26, 1888, prevented them from becoming *the legal owners* of said mark in the Philippines.

This conclusion is supported by article 7 of the decree of 1888, which provides:

> "No one shall have the right to enforce the ownership of trademarks, designs, or industrial models, if he is not provided with the proper certificate obtained according to the dispositions of this decree or to those of the decree of the 4th of January, 1884."

The obligatory nature of the requirement of registration of all marks whatsoever under either the decree of January 4, 1884, or that of October 26, 1888, to acquire property in such marks, is further shown by the following portions of article 39, under Title VII, Penal Dispositions of the Decree of 1888:

> "The following shall be punished by a government proceeding, by a fine of from P15 to P45, without prejudice to the civil and criminal actions which may lie:
>
> "1. Those who shall use a trademark, design, or industrial model without having obtained the corresponding certificate of ownership.
>
> * * * * * * *
>
> "4. Those who shall use a mark after the lapse of ninety days from the publication of this decree, without having complied with the requisites established in the transitory dispositions."

The so-called transitory dispositions are articles 46 and 47, quoted *supra*, and article 48, requiring owners of marks to send copies thereof to the Royal Economic Society to be filed, and article 49, repealing all prior regulations conflicting with the instant decree.

As regards the right of foreigners to register under the decree of October 26, 1888, article 11 thereof provides:

> "Foreigners residing outside of Spain shall have the right granted to them by the treaties concluded with their respective nations, and if there is no treaty, the right of reciprocity shall be strictly observed."

Articles 30 and 31 set out the formalities to be observed by foreigners in applying for certificates and provide for the keeping of a special register for their applications.

Hence it was possible for Van Den Bergh & Co. to have registered under the decree of October 25, 1888, since the case of registration by foreigners was expressly provided for.

Now, by article 5 of the treaty of February 12, 1870, between Belgium and Spain, Van Den Bergh & Co. were entitled to the same protection as Spaniards in the matter of trademark property. The question then is: How could a Spaniard, resident in the peninsula or in the colonies other than the Philippines, who had registered his mark in Spain, secure his property right therein in the Philippines? The decree is explicit on this point. Article 32 provides:

> "Manufacturers, industrials, merchants or agriculturists who reside in the peninsula, in the adjacent islands, in Cuba or in Porto Rico, and who wish *to secure the property* of the marks which indicate their products or their designs or industrial models, in the Archipelago, *provided they are both authorized and recognized, and the interested party has the corresponding certificate or title of property issued according to the laws which govern in the matter*, shall resort to the Ministry of Ultramar, accompanying the application with a certified copy and a duplicate drawing which represents their mark, design, or model."

The purpose of this article was to provide a means by which Spanish owners of trademarks might secure *the property right* to their marks in the Philippines. The inference is clear that without complying with the formalities prescribed in this article, such owners acquired no rights in the Philippines by virtue of a registration in Spain. Upon no possible construction of this decree and of the treaty of February 12, 1870, could Van Den Bergh & Co., a foreign firm, acquire greater rights in the Philippines than Spanish subjects under the same circumstances.

Moreover, whatever right the firm of Van Den Bergh & Co. may have had to the One Bell mark in the Philippines prior to 1888 that right became extinct by the lapse of time. Article 17 of the decree of October 26, 1888, which, as previously pointed out, established the trademark law applicable to the Philippines, provides:

> "The certificates of ownership shall expire in fifteen years, to be counted from the date of their concession; but they may be renewed by the same means prescribed for their acquisition."

The certificate issued to Van Den Bergh & Co. is dated December 11, 1873 (Ex. "8," R., 97-98). Under the above provision that certificate, if ever valid in the Philippines, expired in fifteen years, *i. e.*, on December 11, 1888, and to continue their ownership of the One Bell mark it was incumbent upon Van Den Bergh & Co. to secure a new certificate. The record does not show that such certificate was ever secured. Wherefore the right of Van Den Bergh & Co. to that mark lapsed by the expiration of time.

Appellant submits that the aforesaid considerations clearly establish that whatever rights Van Den Bergh & Co. may have had in the Philippines under the registration in Spain on December 11, 1873 (and appellant does not admit that they acquired any rights thereunder), those rights were lost by the failure of that company to comply with the royal decree of October 26, 1888.

THE NEXT QUESTION THAT ARISES IS: ADMITTING THAT THE RIGHT OF VAN DEN BERGH & CO. TO THE ONE BELL GIN TRADEMARK IN THE PHILIPPINES WAS LOST, COULD APPELLANT THEREAFTER LAWFULLY REGISTER A MARK SUBSTANTIALLY SIMILAR THERETO?

Paragraph 5 of article 5 of the royal decree of October 26, 1888, provides as follows:

> "Manufacturers, merchants, agriculturists, or business men of any kind, shall be free to adopt for the products of their factory, commerce, or agricultural industry, the trademarks which they may deem advisable, excepting the following:
>
> * * * * * * *
>
> "5. The marks already used by some one else under authority of the proper certificate *as long as the said certificate has not become void according to the provisions of the present decree.*"

Negatively this section authorizes the registration by any one of marks the certificates of which have become void under the decree. It has been pointed out that the certificate of Van Den Bergh & Co., if it ever was valid in the Philippines, became void under the decree of October 26, 1888, by the failure of that company to register its mark thereunder. It follows that appellant could thereafter lawfully appropriate the very mark formerly claimed by Van Den Bergh & Co.; and if he could so register the identical mark of that company, he could even more clearly register one substantially similar thereto.

In a case arising under article 5 of the royal decree of August 21, 1884, establishing the trademark law for Cuba, which article is exactly the same as article 5 of royal decree of October 26, 1888, for the Philippines, the Supreme Court of Cuba held that when one's property in a trademark ex-

pires another may register that identical mark as his property. *Sen. Mag* 26, 1906—Gaceta Oficial, Sept. 5, 1906.

It is now evident (1) that Yan Den Bergh & Co. lost whatever right to the One Bell gin trademark they may have had in the Philippines by failing to register the mark in accordance with the provisions of the royal decree of October 26, 1888, and (2) that the registration by appellant under this decree, of a mark similar to that of Van Den Bergh & Co. was in all respects lawful and proper and vested the property right to the Three Bells mark in him.

APPELLANT FURTHER SUBMITS THAT HIS PROPERTY IN THE THREE BELLS MARK WAS EXPRESSLY PROTECTED AND GUARANTEED BY ARTICLE XIII OF THE TREATY OF PARIS, RATIFIED APRIL 11, 1899, WHICH READS AS FOLLOWS:

> "The rights of property secured by copyrights and patents, acquired by Spaniards in the Island of Cuba, and in Porto Rico, the Philippines and other ceded territories at the time of the exchange of the ratifications of this treaty, shall continue to be respected."

In view of the foregoing, appellant contends that the Supreme Court of the Philippines was in error in its application of section 9 of Act No. 666 to the facts of this case, for the holding of that court (A) gives that section a retrospective operation, destroying the vested right of appellant to the trademark registered by him, and (B) permits a legislative act of the Philippine Commission to override the provisions of a treaty entered into by the United States.

A.

The holding of the Supreme Court of the Philippine Islands gives section 9 of Act No. 666 a retrospective operation, destroying appellant's vested right in his trademark. As above shown, appellant's registration of his trademark

on December 16, 1898, was a perfectly lawful and regular act investing him with title to the registered mark. The decision of the court, however, in effect relates back and makes his registration unlawful, and by denying him the protection of the courts in the use of his trademark, practically speaking, deprives him of his legal and beneficial right therein. Appellant contends that the language of the section does not warrant the court in giving it retrospective operation.

In the case of *Chew Heong vs. United States*, 112 U. S., 536, 559, this court through Mr. Justice Harlan, laid down the following rule of statutory construction:

> "* * * the courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In *United States vs. Heth*, 3 Cranch, 398, 413, this court said that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the settled doctrine of this court."

Appellant contends that the above rule of construction is so fundamental to any system of jurisprudence based upon primary conceptions of justice and order that it should have been recognized and applied by the Supreme Court of the Philippine Islands and further that its application in this case makes the construction of section 9, *supra*, as laid down by the court below, erroneous.

B.

The construction given by the court to section 9 of Act No. 666 permits a legislative act of the Philippine Commission

to override the provisions of a treaty entered into by the President of the United States and ratified by the Senate. As has been shown above, at the time when Spain ceded the Philippines to the United States, appellant was, under Spanish law then prevailing, the absolute owner of the Three Bells mark, and his property right therein was expressly protected by article XIII of the Treaty of Paris, *supra*. The construction put upon section 9 of Act No. 666 by the court, denying the appellant relief for the invasion of his property right by appellee, in effect, results in the partial abrogation of the above-mentioned treaty by the legislative act of the Philippine Commission.

In *Whitney vs. Robertson*, 124 U. S., 190, 194, Mr. Justice Field, speaking for this court, said:

> "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."

And in *Lem Moon Sing vs. United States*, 158 U. S., 538, 549, Mr. Justice Harlan laid down the following rule for the guidance of the judicial conscience:

> "* * * it is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction."

An act of the Philippine Commission, appointed by the President and exercising legislative powers delegated to it by Congress, is certainly of no greater sanctity than an act

of Congress itself, a body deriving its powers directly from the people and the States, and therefore no more liberal rule of construction should be applied to the acts of the former than to those of the latter in determining to what extent, if any, those acts modify or annul prior existing treaties. Appellant submits that the general language of section 9, *supra*, does not "clearly and plainly point" to a repeal, either in part or *in toto* of the above-mentioned article of the treaty, and that therefore the construction of that section as enunciated by the court below should not be sustained.

In support of its contention that appellant had no cause of action under Act No. 666, *supra*, the court below proceeds further (R., 151 and 152):

> "Neither through the lack of registration of the trademark of Van Den Bergh & Co. nor by reason of the expiration of the copyright for its use, could the plaintiff consider himself at liberty to feel (freely?) and with impunity use the same. Section 1 of the said act (No. 666) reads as follows:
>
> "'In order to justify recovery for violation of trademark rights in the preceding section defined, it shall not be necessary to show that the trademark had been registered under the royal decree of 1888, providing for registration of trademarks in the Philippine Islands, in force during the Spanish sovereignty in these islands, nor shall it be necessary to show that the trademark has been registered under this act. It shall be sufficient to invoke protection of his property in a trademark if the party complaining shall prove that he has used the trademark claimed by him upon his goods a sufficient length of time so that the use of the trademark by another would be an injury to him and calculated to deceive the public into the belief that the goods of that other were the goods manufactured or dealt in by the complaining party.'
>
> "The fact that both are authors of a fraudulent imitation of the trademark of a third person, one which was anterior to both of theirs and was variously copied in order to sell as 'La Campana' gin from

Antwerp, those gins which the one and the other have offered the public under the trademark of 'Dos Campanas' and 'Tres Campanas,' cannot be considered *res inter alios acta* for the foundation of an action between the plaintiff and the defendant. The usurpation of a trademark by means of an imitation is punished by law, and this is what the paintiff puts forward as his right of action against the defendant. The latter, in turn, in answer to the plaintiff and for the purpose of denying his right of action, sets up the same charge of imitation, and supports his exception by offering in evidence the trademark that was imitated, substituted and originally usurped; the right of a third person is not contested except as a defense against the plaintiff and whatever is legitimate as a cause of action is equally legitimate as a defense. If the action is a legitimate one, although the usurped trademark was not entered or registered, legitimate must also be the defense, although the mark usurped in turn by the complaining and injured party, may not have been recorded or registered. Therefore, there is no injury to him who in turn damages another by the same kind of injury, or no action for usurpation can be maintained by one who in turn appears as guilty of identical usurpation; evidence to this effect with respect to an act relating to a third person is not *res inter alios acta* but a necessary proof of the defense of the defendant. And, inasmuch as the provisions of the law must be complied with, it is needless in order to decide this case, to consider the other exceptions or defenses of the defendant; the lack of the right of action stands foremost owing to its conclusive effect."

Appellant contends that the court was in error in its application of section 4, *supra*, to this case. *The provisions of this section are made applicable only to the plaintiff in a case*. The opening words of the section are, "In order *to justify recovery*," etc. Appellant here was not seeking a recovery, but was attempting to prevent appellant from recovering against him (appellee). The beginning of the second

sentence reads, "It shall be sufficient to invoke protection of his property in a trademark *if the party complaining shall prove*," etc. Appellee was not a complainant but a defendant. Hence the language of the section has no application to any right of the appellee.

The court, however, held that "whatever is legitimate as a cause of action is equally legitimate as a defense" and on this general proposition decided that the evidence relating to the Van Den Bergh & Co. claim was properly injected into the case, under section 4, *supra*. The proposition as stated is too sweeping to be accepted without limitation. But admitting its truth as a general principle and admitting further for purposes of argument that appellant's trademark was an infringement of Van Den Bergh's the question is: In whose favor did a cause of action, if any, exist in virtue of that infringement? Obviously in favor of Van Den Bergh & Co., and not in favor of appellee who sustained absolutely no relations to that company. The holding that a cause of action against appellant existing in favor of Van Den Bergh & Co. of Antwerp, Belgium, could be interposed successfully by appellee, a resident of the Philippine Islands, as a defense to an action brought against him by appellant, is a proposition the very statement of which carries its own refutation.

Wherefore appellant submits that the Supreme Court of the Philippines erred:

I.

In holding that the trademark used by appellant and the one registered by him were not legally the same.

II.

In holding that appellant was not protected in the use of his mark, even though unregistered, under section 4 of Act No. 666, *supra*.

III.

In sustaining the lower court in admitting evidence relating to Van Den Bergh & Co.'s rights to the One Bell mark.

IV.

In refusing to appellant the protection of article XIII of the Treaty of Paris in the use of the Three Bells trademark duly registered in the Philippines, according to Spanish law in force there prior to the time of the cession of those islands to the United States.

V.

In holding that appellant had no cause of action under sections 4 and 9 of Act No. 666 of the Philippine Commission, approved March 6, 1903.

APPELLANT CONTENDS ALSO THAT THE FOLLOWING GROUNDS ALLEGED BY THE COURT OF FIRST INSTANCE OF MANILA AS A BAR TO APPELLANT'S RIGHT TO RELIEF AGAINST THE ACTS OF APPELLEE, WHICH GROUNDS WERE NEITHER ADOPTED NOR REJECTED BY THE SUPREME COURT OF THE PHILIPPINE ISLANDS, ARE WITHOUT MERIT:

I.

That appellant's patent was void because the sheets of "Papel Reintegro" (official paper) covering the fees for appellant's trademark was not signed and did not bear the official seal of the issuing office.

II.

That the suit should have been brought in the name of the manager of the firm, Tuason, Legarda & Co., in which appellant had an account in participation and which manufactured the gin labeled with appellant's trademark and seal.

III.

That appellant had no cause of action under section 7 of act No. 666 of the Philippine Commission, because:

(*a*)

The label, seal, etc., used by appellee were not sufficiently similar to those of appellant.

(*b*)

There was no evidence of an intention on appellee's part to deceive the public or defraud appellant.

The discussion of these matters is pertinent to the case inasmuch as the second error assigned, that "the court erred in holding that the plaintiff and appellant has no cause of action in this case" (R., 159), warrants a consideration of the merits of the entire case.

I.

The court did not say in so many words that the absence of the official signature and seal from the "Papel Reintegro" made appellant's certificate a nullity, but the following sentence from its opinion justifies an inference that the court intended so to hold (R., 16):

> "Further, the sheets of 'Papel Reintegro' (official paper) covering the fees for the said trademark, are not signed and do not bear the seal of the respective office, that is to say, of the office of the Director-General of Civil Administration, by which it is said the patent was issued."

Article 28 of the royal decree of October 26, 1888 (*Colección Legislativa de España*, v. 141 (2), p. 1239), under which appellant registered his trademark in 1898, provides that "the applicant shall pay for the issuance of the patent, under penalty of having his right expire, twelve and a half pesos, in stamped paper, the stub of which shall be added to the record. The certificate shall be signed by the Governor-General and recorded in the register to be kept for that purpose in the office of the Bureau of Agriculture, Industry, and Commerce of the General Direction of the Civil Administration."

This article provides that the right to a trademark shall expire if the applicant fails *to pay* twelve and a half pesos. There is absolutely nothing in this article nor in any other article of the royal decree of 1888 providing that the absence of the signature of the proper officer or of the official seal from the "Papel Reintegro" shall cause the right to a trademark to expire.

Even admitting that the fact that the "Papel Reintegro" was not signed by the proper officer and did not bear an official seal is conclusive evidence that appellant never paid the fees required by article 28, that fact alone would not, of itself, cause appellant's right to the Three Bells trademark to expire. Title V of the royal decree of 1888 sets out the conditions under which trademark rights expire. Article 17 thereunder provides:

> "The certificates of property shall expire in fifteen years, to be counted from the date of their concession; but they may be renewed by the same means prescribed for their acquisition."

Article 18 provides:

> "The certificate shall also expire:
> "(1) By the disappearance of the juridical personality to which its use shall belong;
> "(2) By final judgment of a competent court, but only with reference to the person overcome in the suit;
> "(3) When the interested party shall solicit it;
> "(4) When the object of the patent shall not have been put into practice in the archipelago within the time herein required;
> "(5) When the possessor shall have neglected to exploit it for a year and a day, unless he justifies his neglect by unavoidable cause (fuerza mayor);
> "(6) By the failure to comply with the other requirements provided for in this decree."

Article 20 provides:

> "The declaration of expiration in cases prescribed in article 18, and in Nos. 1, 2, 3, 4 and 6, corresponds to the Ministry of Ultramar, when marks conceded in the islands are in question, previously notifying the civil direction of the Economic Society, and there shall lie against the resolution of the ministry the recourse of Contentious Administration, before the Council of State, within thirty days."

Admitting that the evidence shows that appellant never paid the necessary fees, his case would fall under paragraph 6 of article 18, *supra*. But article 20, *supra*, provides for the declaration of the nullity of trademarks under paragraph 6 of article 18 by the Ministry of Ultramar. In other words, the mere failure of appellant to pay the prescribed fees would not *ipso facto*, without more, cause his right to expire, but to accomplish this a quasi-judicial proceeding before the Ministry of Ultramar was necessary in addition. There is nothing in the record to show that appellant's trademark was ever declared expired by the Ministry of Ultramar. It follows, therefore, that appellant's trademark remained in full force and effect.

II.

The language of the trial court holding that appellant was not a proper party to institute suit for the infringement of his trademark is as follows (R., 17-18):

> "Finally, it appears from Exhibit 'L' that plaintiff had been given a share, in a separate account, with the firm of Tuason, Legarda & Co., under the heading of 'Wines and Liquors,' which goods were to be sold with labels bearing plaintiff's name, so as to distinguish them from the other liquors manufactured by the factory 'La Rosario,' in which said factory the plaintiff was at the same time employed as a maker of wines and liquors.
>
> "Plaintiff, although a partner in the business, or in that particular business only, and although the labels used on the bottles of gin manufactured by the distillery La Rosario, bear his name, under his agreement with the firm, and although for this reason he might consider himself the owner of the said label bearing the trademark 'Ginebra de Tres Campanas,' he had no legal capacity to exercise any action with reference to the said trademark or label. The person who had such right was the manager of the firm of Tuason, Legarda & Co., in the business of which he had a share, that is to say, in the business of manufacturing liquors and wines; for it is well known that, in the case of a partnership like this the manager is the person who should represent the firm in any litigation, and in the case of an 'account in participation' the firm giving such interest or participation is the only one that has a legal capacity to represent the firm in all matters affecting the partnership or any of the persons having a share in the same or in any business conducted by the same."

Appellant submits that the court was in error in the above portion of its opinion. From the "Contract of account in participation entered into between Benito Legarda, as manager of the firm of Tuason, Legarda & Co., and Patricio

Ubeda" (Ex. "L," R., 85), it appears that appellant contributed as his share in the firm business certain articles valued at $9,000.00 Mexican currency. But it does not appear that he contributed his trademark, of which there is only the following general mention in the contract (R., 85):

> "Mr. Ubeda hereby agrees to personally devote himself to the manufacture of wines and liquors at the establishment known as 'La Rosario,' supervising the manufacture of the same in person without the intervention of any other person, either in his methods, or in the actual manufacture of the same, he, therefore, being the only technical director and person responsible for the products manufactured by him, *which shall bear his name on the labels to be placed on the goods*, before they are sold on the market, in order to distinguish them from the other liquors distilled at the said distillery 'La Rosario.'"

Moreover, the letter of Benito Legarda, manager of the firm of Tuason, etc., dated at Manila, October 24, 1904, and addressed to Messrs. Van Den Bergh & Co., Anvers, shows that the firm did not consider appellant's trademark as part of its property, but recognized that the same was appellant's exclusively (Ex. "4," R., 91). That letter reads as follows:

> "MANILA, P. I., *October* 24, 1904.
>
> "Messrs. VAN DEN BERGH & Co., *Anvers*.
>
> "DEAR SIRS: We acknowledge receipt of yours of September 13th last, and in reply to same beg to state that, although Mr. Patricio Ubeda is now absent from these Islands, we know that during the Spanish régime he had the trademarks used by him duly registered in accordance with the law then in force and that the said trademarks are protected by the Treaty of Paris. You may, however, verify these statements on our part. *Under our contract with Mr. Ubeda we are not responsible for the trademarks which he may see fit to use and may have a right to*

use, that being a matter as to which he only is responsible. You will readily understand that your threats to institute judicial proceedings can in no way affect us, for we are neither imitators nor forgers of your trademark.

"Upon his return, we will request Mr. Ubeda to send you a copy of his certificates of registration, giving you all the necessary explanation in order to convince you that he is using *his trademarks* lawfully. If Mr. Ubeda's explanation be not entirely satisfactory to us, you can rest assured that we will be the first ones to prevent his further use of the trademark in question.

"We beg to remain,

"Yours respectfully,

"(Signed) BENITO LEGARDA."

So far as this record shows Van Den Bergh & Co. never sued this appellant to restrain him in the use of his trademark. Had they done so it is certain appellee would have made the fact appear in *this* case.

In view of the aforegoing appellant contends that the title to the Three Bells gin trademark remained in him notwithstanding his entry into the firm of Tuason, etc., and that the most that passed to said firm was a license to use the trademark.

The case of *Kidd vs. Johnson*, 100 U. S., 617, is in point here. In that case one Pike, a whole-sale dealer in whiskey, adopted as a trademark the words, "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio." Later he took two of his former clerks into partnership with him and continued using the same trademarks as before without any change. The firm subsequently moved to New York City, and Pike sold the real property in Cincinnati and all the distilling apparatus to Mills, Johnson & Co., to whose rights complainants succeeded. At the same time Pike executed and delivered to Mills, Johnson & Co., a separate instrument by which he transferred to them and their successors the use of all his brands formerly used by him in his Cincinnati house. After

Pike's death the surviving partner claimed title to the trademark by virtue of his survivorship. This court held, however, that the trademark remained at all times Pike's property and did not become part of the partnership assets. Mr Justice Field said (p. 619):

> "It is admitted that Pike was the owner of the trademark when he took two of his clerks into partnership and formed the firm of S. N. Pike & Co. He did not place his interest in the trademark in the concern as a part of its capital stock. He allowed the use of it on packages containing the whiskey manufactured by them; but it no more became partnership property from that fact than did the realty itself, which he also owned, and on which their business was conducted."

The following are to the same effect:

> "Where a trademark or trade name is owned by one who enters into a partnership with another for the manufacture of the article designated, the title of the trademark does not pass to the partnership except by express agreement."
>
> *Graeven vs. Bell*, 115 Fed. Rep., 553, 554.

> "While it is commonly said that to entitle the owner of a trademark to protection against infringers his right to its use must be exclusive, it is not meant thereby that no other than the originator has rightfully employed it. Such a right is properly transferable and descendible and may be the subject of ownership by two or more, without impairing the claim of its owners to redress for its unlawful use by others."
>
> *Cleveland Stone Co. vs. Wallace*, 52 Fed. Rep., 431, 435-436.

In *Batcheller vs. Thomson*, 35 C. C. A., 532; 93 Fed. Rep., 660, the court held that the use by a firm of a trademark belonging to one of the partners did not make the

mark partnership property. To like effect see 28 Am. & Eng. Encyc. (2d ed.), 406:

> "On the formation of a partnership with one who owns a trademark, whether it becomes an asset of the partnership or not, depends on contract. Where one allows the use of his mark on goods manufactured by the firm, that fact alone does not operate as a transfer of it, but it may remain the sole property of the individual owner."
>
> *Browne, Trademarks* (2d ed.), sec. 364.

These authorities show that notwithstanding the use of appellant's trademark on products of the firm of Tuason, Legarda & Co., that mark continued to be a property right of appellant. It follows, therefore, that suit for the invasion of that property right could be brought only in the name and for the benefit of appellant.

This conclusion is reinforced by the principles of Spanish law in force in the Philippines at the time appellant became a member of the firm of Tuason, Legarda & Co., in 1901.

Article 15 of the royal decree of October 26, 1888, which was not repealed until 1903, by Act No. 666 of the Philippine Commission (see section 22 of that act) provides that

> "The property protected by the certificates of trademarks, industrial drawings, or models shall be considered for the purposes of transfer or conveyance and for all other purposes of law exactly on the same footing as all personal property."

Article 1675 of the Civil Code, then as now in force in the Philippines, provides as follows:

> "Personal or real property which each of the partners may possess, at the time of the celebration of the contract, shall continue to be their private property, the usufruct only passing to the partnership."

Moreover article 16 of the royal decree of October 26, 1888, requires the recordation of all transfers of trademarks. That article provides:

> "For the better protection of the assignees of trademarks, industrial drawings and models, information shall be given to the General Direction of the Civil Administration of every transfer, whether by contract or by descent of the trademark, drawing, or model. A certified copy of the deed of transfer or of the provision of the will by which it was conveyed shall be filed within the period of three months, to be counted from the date of the transfer and the deeds shall be recorded in the Royal Economic Society."

There is no evidence that a deed evidencing a transfer of the Three Bells trademark from appellant to the firm of Tuason, Legarda & Co. was ever executed or recorded.

These provisions of the Spanish law pertinent to the case show that the legal title to the trademark was at all times in appellant, and that all that the firm of Tuason, Legarda & Co. ever acquired was a right of user.

The case of *Moxie Nerve Food Co. vs. Baumbach*, 32 Fed. Rep., 205, is pertinent in this connection. In that case it was held that the owner of a trademark is not estopped from bringing suit to enjoin an infringement of it by the fact that he has made a third party his licensee for the territory in which the defendant carries on the business as to which the infringement is charged. The court said (p. 210):

> "It is also claimed that the complainant cannot maintain this action by reason of having made J. J. Schott & Co. its licensee of the State of Texas and other sections, and of its contract with Schott & Co., but I do not think so. *The fee to the trademark* still remains in the complainant and an injury to it will justify an injunction."

III.

APPELLANT MAINTAINS THAT THE COURT WAS ALSO IN ERROR IN HOLDING THAT APPELLANT HAD NO CAUSE OF ACTION UNDER SECTION 7 OF ACT NO. 666 OF THE PHILIPPINE COMMISSION.

That section reads:

> "Any person who in selling his goods shall give them the general appearance of goods of another manufacturer or dealer, either in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other feature of their appearance, which would be likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer other than the actual manufacturer or dealer, and who clothes the goods with such appearance for the purpose of deceiving the public and defrauding another of his legitimate trade, or any subsequent vendor of such goods or any agent of any vendor engaged in selling such goods with a like purpose, shall be guilty of unfair competition, and shall be liable to an action for damages, in which the measure shall be the same as that provided for a violation of trademark rights, together with discretionary power in the court to impose double damages, if the circumstances call for the same. The injured party may also have a remedy by injunction similar to that provided for in cases of violation of trademarks. This section applies in cases where the deceitful appearance of the goods, misleading as to origin or ownership, is effected not by means of technical trademarks, emblems, signs, or devices but by the general appearance of the package containing the goods, or by the devices or words thereon, even though such packages, devices, or words are not by law capable of appropriation as trademarks; and in order that the action shall lie under this section,

> actual intent to deceive the public and defraud a competitor shall affirmatively appear on the part of the person sought to be made liable, but such intent may be inferred from similarity in the appearance of the goods as packed or offered for sale to those of the complaining party."

This section defines unfair competition and provides a remedy therefor. It should be noted here that the Court of First Instance treats the case indifferently as an instance of trademark infringement, defined in section 3 of the above-mentioned act, and of unfair competition under section 7 of that act. Appellant contends that his case comes within the scope of both of these sections and that he is entitled to relief under either.

Under section 7 two elements are necessary to constitute unfair competition: (A) That the defendant give his goods "*the general appearance*" of those of the plaintiff; (B) that actual intent to deceive the public and defraud the plaintiff affirmatively appear or be inferable from the similarity in the appearance of the goods.

This section, in effect, is a restatement of the common law of unfair competition.

Hopkins, Trademarks (2d ed.), sec. 19.

28 *Am. & Eng. Encyc.* (2d ed.), 409, 418-419.

Lawrence Mfg. Co. vs. Tennessee Mfg. Co., 138 U. S., 537, 549.

Coats vs. Merrick Thread Co., 149 U. S., 562, 566.

Hilson vs. Foster, 80 Fed. R., 896, 897.

Dennison Mfg. Co. vs. Thomas Mfg. Co., 94 Fed. R., 651, 659.

A.

Appellant contends that the Court of First Instance erred in holding that there was not sufficient similarity in the general appearance of appellee's products and those of appellant to satisfy section 7, *supra*.

The points in which appellee's gin as put on the market resembles appellant's are:

(*a*) Both are contained in bottles into which appellant's mark is blown (R., 10).

(*b*) Both have lead caps over the corks of the bottles (R., 12).

(*c*) Both have labels similar in form, size, and general appearance (R., 11).

(*d*) Both have seals substantially similar (Ex. "D," R., 78; Ex. "N," R., 86).

The Court of First Instance refused to consider as important the fact that appellee bottled his gin in black and white square-faced bottles specially prepared by appellant (R., 10) on the ground that appellant himself testified (R., 35) "that manufacturers of gin as a rule, indiscriminately used bottles belonging to others; that he (appellant) too, used bottles belonging to other manufacturers; that the bottle made no difference; that he did not object to the bottle, but to the imitation of the labels."

In spite of this apparently damaging admission, appellant contends that the fact that appellee used his (appellant's) square-faced bottles in preparing his gin is of importance in estimating the resemblance between appellee's and appellant's products, and deducing appellee's purpose therefrom. It should be noted in this connection that while appellant testified that *manufacturers of gin*, as a rule, indiscriminately used bottles belonging to others, there was not one tittle of evidence adduced to show that such practice was known to the *consuming public* and that, therefore, the use of appellant's bottles by appellee would not induce the public to believe that the gin contained therein was that of appellant, and thus enable appellee to palm off this gin as that of appellant.

Evans vs. Von Lacr, 32 Fed. Rep., 153, is in point here. In that case the parties were dealers in lime juice, both importing the same from Montserrat and labeling it "Mont-

serrat Lime Fruit Juice." The evidence showed that while lime-juice bottles on the market were all quite similar in size and design, those of plaintiff had his name blown into them. The court decided that defendant's label was not similar to that of plaintiff, but enjoined the defendant from using bottles with plaintiff's name on them. The court said (p. 155):

> "The evidence is that some bottles used by defendant have the complainants' name blown into them. I am aware that the name is on the bottom of the bottle, and that it is not very prominent; but while the defendant may buy in the market these bottles, and sell them again filled with anything but lime juice, I do not think he should be permitted to put his own lime juice into a bottle stamped with the complainants' name and sell it. This may be said to be calculated to lead the public to believe they are buying the complainants' lime juice, when, in point of fact, they are buying some other person's. *Rose vs. Loftus*, 38 L. T. R. (N. S.), 49; *Richards vs. Williamson*, 30 L. T. R. (N. S.) 746. To this extent I think the complainants are entitled to a decree; and it is so ordered."

In *Sawyer Crystal Blue Co. vs. Hubbard*, 32 Fed. Rep., 388, the court enjoined defendant from putting up his bluing in old bottles of the plaintiff, "with the words 'Sawyer's Crystal Bluing' moulded or blown on one side," notwithstanding defendant's contention, "that the shape of bottle used by plaintiff was the one used generally for putting up liquid bluing, and that it was the custom to buy old bluing bottles indiscriminately."

In *Van Hoboken vs. Mohns & Kaltenbach*, 112 Fed. Rep., 528, 531, Morrow, circuit judge, said:

> "Even if the respondent in the case at bar was using the bottles of complainants as a mere convenience, without dishonest motives, the custom of refilling receptacles bearing distinctive trade names

> or marks with other manufactures is too dangerous and allows too great an opportunity for fraud against the owners of valuable preparations, to be permitted."

In *Rose vs. Loftus*, 47 L. J. Ch., 576; 38 L. T. (N. S.), 409, the court said:

> "I lay it down as a general rule, that it is not justifiable for a trader to fill bottles, or casks, or anything else bearing a known name, so as to induce the public to believe that the thing contained in those vessels is the production of the man whose name they bear; because by doing that he puts it in the power of the person selling the goods to impose on the public."

Appellant contends that the use by appellee of his (appellant's) bottles labeled with the trademarks and seals, previously described, similar in appearance to those of appellant, and having in addition similar lead caps over the corks, is more than sufficient to satisfy that portion of section 7, *supra*, which requires that the person charged with unfair competition must be shown to have given his goods "*the general appearance* of the goods of another manufacturer or dealer, either in the wrapping of the packages in which they are contained or the devices or words thereon, or in any other feature of their appearance, which would be likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer other than the actual manufacturer or dealer."

In holding that there was not sufficient resemblance between the bottles of gin as prepared and offered for sale by appellee with the label and seal used by him, and those of appellant, the court, in effect, put the bottles of appellee beside those of appellant and entered into a minute examination of all the points of resemblance and difference between the products of appellee and appellant. In this fashion the court was able to see differences which the ordinary purchaser, asking for appellant's gin but having only gin from

appellee's bottles offered to him, would have been wholly unconscious of.

Appellant contends that the court was in error in making the above-described comparative dissection of the products of appellee and appellant.

In the law of unfair competition as in the law of trademark infringement neither exact nor approximate identity of appearance is required. The aim of the law is (*a*) to protect the reputation of plaintiff's products, and (*b*) to prevent the consuming public from being deceived into purchasing a defendant's products for those of a plaintiff. Hence the test of unfair competition as of trademark infringement is: Does the defendant's product so closely resemble that of the plaintiff that ordinary purchasers, buying with ordinary caution, are likely to be misled?

28 Am. & Eng. Encyc. (2d ed.), 410.

Hopkins, Trademarks (2d ed.), sec. 1.

McLean vs. Fleming, 96 U. S., 245, 253, 255.

Mfg. Co. vs. Trainer, 101 U. S., 51, 64.

Procter & Gamble Co. vs. Globe Refining Co., 92 Fed. Rep., 357, 361.

Dennison Mfg. Co. vs. Thomas Mfg. Co., 94 Fed. Rep., 651, 659.

This underlying test of trademark infringement and of unfair competition is well put by Mr. Justice Clifford in McLean *vs.* Fleming, *supra*. He says:

> "Much must depend, in every case, upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods and induce him to suppose that he was purchasing the genuine article,

> then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights, and to prevent their continued invasion."

Moreover, according to the above and also according to the following authorities the likelihood that the *ultimate* and not the *immediate* purchaser will be deceived is the controlling factor:

Liggett & Myer Tobacco Co. vs. Hynes, 20 Fed. Rep., 883, 885.

Southern White Lead Co. vs. Cary, 25 Fed. Rep., 125, 126.

N. K. Fairbank Co. vs. R. W. Bell Mfg. Co., 23 C. C. A., 554; 77 Fed. Rep., 869, 871, 875, 878.

Nat'l Biscuit Company vs. Baker, 95 Fed. Rep., 135.

Little vs. Kellam, 100 Fed. Rep., 353.

N. K. Fairbank Co. vs. Luckel, King & Cake Soap Co., 42 C. C. A., 376; 102 Fed. Rep., 327, 332.

Hanson vs. Siegel-Cooper Co. et al., 106 Fed. Rep., 690, 691.

Fischer vs. Blank, 138 N. Y., 244, 252.

Goodman vs. Bohls, 3 Tex. Civ., 183, 188-189.

This principle is well stated by Chitty, J., in *Lever vs. Goodwin*, 36 Ch. Div., 1, quoted with approval in *N. K. Fairbanks Co. vs. R. W. Bell Mfg. Co. supra* (p. 878):

> "It has been said more than once in this case that the manufacturer ought not to be held liable for the fraud of the ultimate seller; that is, the shopkeeper or the shopkeeper's assistant. But that is not the true view of the case. The question is whether the defendant's have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers."

And in *N. K. Fairbanks Co. vs. R. W. Bell Mfg. Co., supra*, Lacombe, Cir. J., said (p. 871):

> "Necessarily, in applying the test suggested, viz., the likelihood of deception of an 'ordinary purchaser exercising ordinary care,' regard must be had to the class of persons who purchase the particular article for consumption and to the circumstances ordinarily attending their purchase."

So in the case of *N. K. Fairbanks Co. vs. Luckel, King & Cake Soap Co.* (p. 332), *supra*, where defendant put on the market a soap powder under the name "Gold Drop" in imitation of the well known "Gold Dust" soap powder of plaintiff, the court said:

> "It may be said that if one stops to reflect upon the names 'Gold Dust' and 'Gold Drop,' and listens to the sound, he will discover that the names are not entirely similar. A layman, as well as a lawyer or judge might so decide upon a careful inspection and reading of the names. But in determining that question *we must put ourselves in the place of the purchaser of ordinary caution, who asks for a washing powder called 'Gold Dust,' and from his standpoint determine whether he would be liable to be misled or deceived by the name 'Gold Drop.'*"

The same principle is succinctly put in the following from *Fischer vs. Blank, supra:*

> "The true test, we think, is whether the resemblance is such as that it is calculated to deceive and does, in fact, deceive the ordinary buyer, making purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates."

Accordingly it is well settled that a comparison of the products of a plaintiff and a defendant side by side, is not the test to determine whether there is sufficient similarity

to satisfy the requirements of unfair competition, nor is the similarity insufficient if it can be detected only by experts.

Seixo vs. Provezende, L. R., 1 Ch. D., 192.

Mfg. Co. vs. Trainer, 101 U. S., 51, 64.

Liggett & Myer Tobacco Co. vs. Hynes, 20 Fed. Rep., 883, 884.

Glen Cove Mfg. Co. vs. Ludeling, 22 Fed. Rep., 823, 826.

Centaur Co. vs. Killinberger, 87 Fed. Rep., 725, 726.

Stuart vs. F. G. Stewart Co., 33 C. C. A., 480; 91 Fed. Rep., 243, 245.

Paris Medicine Co. vs. W. H. Hill Co., 42 C. C. A., 227; 102 Fed. Rep., 148, 150. (Opinion by Lurton, Cir. J.)

Sterling Remedy Co. vs. Gorey, 110 Fed. Rep., 372.

Cauffman vs. Schuler, 123 Fed. Rep., 205, 206.

Kronthal Waters vs. Becker, 137 Fed. Rep., 649, 653.

Lawrence Mfg. Co. vs. Lowell Hosiery Mills, 129 Mass., 325, 328.

United States vs. Manuel, 7 Phil. Rep., 221.

Thus in *Liggett & Myer Tobacco Co. vs. Hynes, supra*, the court said:

> "Nor need the resemblance be such as would deceive persons seeing the two trademarks placed side by side (*Mfg. Co. vs. Trainer*, 101 U. S., 64), or such as would deceive experts, persons, because of their peculiar knowledge from their being wholesale or retail dealers, or in any other way conversant with the trademark simulated."

Likewise in *Cauffman vs. Schuler, supra*, the court said:

> "It is not necessary that the resemblance should be such as would deceive first or intelligent purchasers. It is sufficient if it be calculated to deceive the unwary, the incautious, or the ignorant pur-

> chaser. *Neither need the resemblance be so great that one would be deceived who should see the labels placed side by side.* If an ordinary purchaser, looking at the article offered to him, would naturally be led, from the label attached to it, to suppose it to be the product of a rival manufacturer, and would purchase it in that belief, the court will enjoin the use of such article as fraudulent."

The following from the opinion in *United States vs. Manuel, supra*, is to the same effect:

> "The true test of unfair competition is whether certain goods have been clothed with an appearance which is likely to deceive the ordinary purchaser exercising ordinary care, and not whether a certain limited class of purchasers, with special knowledge not possessed by the ordinary purchaser, could avoid mistake by the exercise of this special knowledge."

In view of the principles enunciated by the aforegoing authorities, appellant submits that in making a "careful comparison" of the appearance of appellant's and of appellee's product and resting its opinion upon differences discoverable by that process, the Court of First Instance approached the question of the similarity in appearance of appellant's and appellee's products from a wholly erroneous standpoint. The court should have considered: (*a*) the class of persons who purchase gin at retail in the Philippines; (*b*) their ability or inability to discriminate between things having the same general exterior appearance; (*c*) the circumstances under which gin is commonly sold at retail, *i. e.*, that it is ordinarily sold by the glass over the counter, and therefore the consumer has little opportunity, and ordinarily does not take advantage of the opportunity he has, to examine in detail the appearance of the bottle from which the beverage is poured. Viewed from this standpoint, appellant submits that the similarities previously noted clearly show that appellee's product was calculated to

deceive the consuming public and enable appellee to palm off his goods as those of appellant.

The Court of First Instance further reinforced its argument that the appearance of appellee's product was not similar to that of appellant by adverting to the fact that all of appellant's witnesses were able to distinguish between the appearance of appellee's and appellant's gin and that no evidence was adduced to show that any purchaser had been deceived into buying appellee's for that of appellant (R., 12-13. Appellant contends that the court erred in emphasizing these matters.

The record shows that four of the five witnesses for appellant (excluding appellant and appellee) were in the liquor business, either as distillers or as merchants (R., 22, 26, 27, 30), and the court itself found the fifth, Miguel Morales, "unworthy of credit" (R., 14). Under the authorities previously cited, the ability of these witnesses, none of whom was a mere consumer, to differentiate between the dressing of appellee's and appellant's gin is of no consequence.

Moreover, appellant submits that while affirmative evidence of actual deception is entitled to great weight, the lack of such evidence is by no means controlling.

Hopkins, Trademarks (2nd ed.); secs. 98, 106, and 110.

Mfg. Co. vs. Trainer, 101 U. S., 51, 63.

Collinsplatt vs. Finlayson, 88 Fed. Rep., 693.

Fuller vs. Huff, 43 C. C. A., 453; 104 Fed. Rep., 141, 145.

Kentucky Distilleries & Warehouse Co. vs. Wathen, 110 Fed. Rep., 641, 645.

Samuel Bros. & Co. vs. Hostetter Co., 55 C. C. A., 111; 118 Fed. Rep., 257, 259.

O'Connell vs. Nat'l Water Co., 88 C. C. A., 487; 161 Fed. Rep., 545, 546.

Sen. June 2, 1876, Juris-prudencia Criminal, v. 15, pp. 9, 12.

Sen. June 16, 1885, Juri-prudencia Criminal, v. 35, p. 254.

Sen. May 5, 1887, Compilación Legislativa de Ultramar, v. 6, p. 1403.

Sen. March 17, 1892, Legislación Industriel, Garcia Garófalo, p. 91.

Sen. March 29, 1892, Gaceta de Madrid, October 23, 1892.

Sen. June 12, 1893, Gaceta de Madrid, October 28, 1893.

Sen. March 14, 1902, Gaceta Oficial, June 19, 1902.

Decrees and decisions cited by Garcia Garófalo, in Legislación Industriel, pp. 96-98.

This principle of law is thus stated in *Mfg. Co. vs. Trainer*, *supra*:

> "Nor is it necessary, in order to entitle the party to relief, that proof should be given of persons having been actually deceived, or that they bought goods in the belief that they were of the manufacture of the complainant, provided that the court is satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other."

In *Sen., May 5, 1887*, *supra*, the Tribunal Supremo of Spain said:

> "Trade marks and trade names constitute industrial property as legitimate and worthy of legal protection as other kinds of property recognized by law. The law permits neither the use of marks with indications *likely to deceive* the purchaser regarding the nature of the product, nor the imitation of marks in such a way that the purchaser *might be led* to mistake the false mark for the genuine one."

So in *Sen., June 2, 1876*, *supra*, that court said:

> "A tradetmark is infringed when it is imitated in such a way that the infringing mark *might be mis-*

> *taken* at first sight for the genuine one, even though there may be more or less perceptible differences between the two marks."

That evidence of actual deception is unnecessary is further shown by the following from section 7 of Act No. 666 (Philippine Commission):

> "Any person who in selling his goods shall give them the general appearance of the goods of another * * * either in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other feature of their appearance, *which would be likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer other than the actual manufacturer or dealer*, * * * shall be guilty of unfair competition," etc.

The rules by which courts should be guided in determining the degree of resemblance necessary to satisfy the requirements of the law relating to trademark infringement and unfair competition is well put in the following from *Les Marques de Fabrique et de Commerce Droit Belge, Droit International et Droit Compare*, by Thomas Braun and Albert Capitaine, p. 270:

> "In the majority of judicial opinions three rules of decision may be discovered. First of all, the court should consider rather the points of similarity than those of difference. That is self-evident. The purchaser who has in mind, in his eye or ear so to speak, the impression produced by a mark known to him, will be satisfied, in order to verify the origin of the product offered him, by noting the principal elements of the mark, and will feel secure if the general appearance is the same. He does not look to single out minor differences, even though they be rather numerous. The infringer, on his part, when he sets out to imitate a mark, proceeds by deviating from the original mark and modifying it little by little, the least possible, but as far as he deems it prudent. Never does he devise an original mark in order then

to change it and make it more like the other. Hence, more importance should be attached to similarities than to differences.

"The second rule is that the court should place itself in the position of the ordinary purchaser of average intelligence and keenness as of moderate distrust. An infringement is designed to deceive the general public and not experts. It is addressed to retail not to wholesale purchasers, middlemen. There is a rule which goes so far as to hold that courts should be guided by the impression which the infringing mark makes on the mind of an illiterate and careless purchaser. The truth is that regard should be had for the class of persons for whom the product is destined, their intelligence and carefulness, always taking into consideration the fact that the purchaser never makes a minute examination of a mark and has not before him the two marks. He cannot compare them, and his recollection of the genuine is the only basis he has for a comparison side by side with the infringing mark.

"The third rule is the following: The court should not seek to find out if confusion has in fact been produced; sufficient that it is possible. This is evident since infringement exists if the imitation is sufficient and it is sufficient if it is likely to deceive.

"In general the court will be able to reach a decision by inspection only and by recalling its impression of the marks. However, there is no objection to resorting to close examination. Similar processes of inquiry will be useful when the product is for a special class of purchasers or when confusion has in fact resulted. The plaintiff will prove the possibility of confusion much more easily than that confusion has resulted in a given class of trade.

"These rules are also followed by foreign tribunals." (citing American, English, and Swiss authorities).

While it is true that, in determining the sufficiency of the resemblance of a defendant's goods to those of a plaintiff, every case of unfair competition must rest upon its own peculiar facts, appellant submits the following cases as illus-

trative of the degree of resemblance that courts have required and as showing, by analogy, that the resemblance in the instant case is ample:

Royal Baking Powder Co. vs. Davis, 26 Fed. Rep., 293.

N. K. Fairbank Co. vs. R. W. Bell Mfg. Co., 23 C. C. A., 554; 77 Fed. Rep., 869.

Sterling Remedy Co. vs. Gorey, 110 Fed. Rep., 372.

Enoch Morgan's Sons Co. vs. Whittier-Coburn Co., 118 Fed. Rep., 657.

Swift & Co. vs. Brenner, 125 Fed. Rep., 826.

Kronthal Waters vs. Becker, 137 Fed. Rep., 649.

Wolf Bros. & Co. vs. Hamilton-Brown Shoe Co., 91 C. C. A., 363; 165 Fed. Rep., 413.

Wolfe vs. Barnett & Lion, 24 La. Ann., 97.

United States vs. Manuel, 7 Phil. Rep., 221.

Brooks Bros. vs. Fradich & Kuttner, 8 Phil. Rep., 508.

Song Fan & Co. vs. Tia Ca Siong, 13 Phil. Rep., 143.

Yebana Co. vs. Chua Seco & Co., 14 Phil. Rep., 534.

In *Royal Baking Powder Co. vs. Davis, supra* (C. C., E. D. Mich., opinion by Brown, J.), defendant put up his baking powders in cans of precisely the same size and shape as those of plaintiff, using labels of the same colors and general design as those of the plaintiff, with the words "Coral Baking Powder" thereon. One half of the label used by both parties had a red background with white letters and the other half a yellow ground with black letters. The corner ornamentations upon the red half were the same, but the words were different. In the center of plaintiff's red ground was a picture of a Royal baking powder can in a circle. In the center of defendant's red ground was a circle containing therein the word "Trademark," with a large picture of a piece of coral below. Notwithstanding the averments of defendant's answer that the colors on the labels were in common use by baking powder manufacturers, the

court granted an injunction, not because the words "Coral Baking Powder" infringed plaintiff's trademark, "Royal Baking Powder," but because of the resemblance between defendant's labels and those of plaintiff. The court said:

> "The difficulty is with the similarity of the labels upon which the words are used. The general arrangement of the words being the same, the devices upon the cans being very much alike and the labels of the same color and general appearance, I think purchasers might be very easily deceived into buying the one for the other."

In *Enoch Morgans' Sons. Co. vs. Whittier-Coburn Co., supra*, plaintiff was the manufacturer of the well-known scouring soap "Sapolio" made in rectangular bars with rounded corners and a raised beading running around the edge of the face side, on which were the words "E. Morgan Sons, N. Y., Sapolio," in raised letters. These bars were wrapped in paper having the appearance of silver, and lengthwise around this wrapper was placed a band of dark blue paper, bordered with two narrow gilt lines, within which there were certain collocations of words. Defendant began the manufacture of a soap constituted similarly to that of plaintiff, of the same size and shape, and with the beaded border, within which appeared "W. C. Co.'s Sapho" in raised letters. Defendant's bars were wrapped in a silvery paper with a dark blue paper band running lengthwise around the bar. The border on the dark blue band at first consisted of two narrow gilt lines, but later of only one. The words and devices on this band were totally unlike those on plaintiff's band, but the grouping on the two was somewhat similar. The labels placed upon the boxes in which the packages were packed for delivery to dealers were also of the same colors as those of plaintiff and were similar in arrangement of letters. The court found no difficulty in holding that defendant was guilty of unfair competition.

In *Kronthal Waters vs. Becker, supra*, plaintiff bottled and sold the waters of a well-known mineral spring in Germany under the name "Blue Label," using a uniform and distinctive dressing consisting of a green bottle having a blue neck label of peculiar shape, with the words "Blue Label" thereon, and a body label containing an elliptical blue panel with white lettering surrounded by a white field with blue lettering. Defendant put on the market a different water in bottles of the same size, shape, and color as those of plaintiff with neck and body labels like those on plaintiff's bottles. The words and sentences on defendant's labels were different from those on plaintiff's and the blue of defendant's dressing was of a slightly deeper shade. On the neck label plaintiff had written the words "Blue Label" and the defendant, "Kosmos Springs." The court said (p. 653):

> "With an exhibit of a bottle both of the complainant and defendant before me, dressed up in the style used by both, ready for sale, I can, of course, *easily* distinguish one from the other; but the resemblance between the two is so close that the consumer, without close attention, could easily be deceived into accepting the mineral water of the defendant when he intended to purchase that of the complainant."

And again (p. 654):

> "It might be that a consumer who has been accustomed to purchase the Blue Label mineral water in quantity, bottled at the spring known as Wilhelm's Quelle in Germany, would detect the difference upon comparison; but in the sale of these waters the purchaser would not likely have both products together, and the great similarity of the two would make him an easy victim to the imposition."

In *Wolf Bros. & Co. vs. Hamilton-Brown Shoe Co., supra*, plaintiff, a somewhat obscure manufacturer of shoes, put out a woman's shoe, which it designated by the name "The American Girl" and advertised extensively with the phrase

"As good as its name" and the picture of the head of a young woman. It also used certain numerals to designate different styles. Defendant, a larger shoe manufacturer, later used the name "The American Lady" for shoes of its make, with the words "With the character of the woman," using also the picture of a young woman, and designating different styles by the same numbers as those used by plaintiff. The court held this a clear case of unfair competition.

In *United States vs. Manuel, supra,* defendant was indicted for unfair competition under section 8 of Act No. 666. The evidence showed that Watson & Co. were engaged in manufacturing and selling soda water, lemonade, ginger ale and other aërated waters. They registered a trademark in the Philippines, consisting of the words "A. S. Watson & Co., Limited," together with the figure of a unicorn and dragon on either side of a Chinese pagoda, which trademark was blown into the bottles used by said company. Labels bearing this trademark were pasted on these bottles. Defendant sold a quantity of aërated water in bottles identical in form and appearance with those used by A. S. Watson & Co., with the trademark of that firm blown into them, which bottles were undoubtedly some formerly used by Watson & Co. Defendant pasted labels on the bottles, partly over the trademark blown therein, which labels contained printed matter different from that on the labels of Watson & Co. The court felt satisfied *beyond a reasonable doubt*, that these facts warranted a holding that defendant had given his goods the general appearance of those of Watson & Co., and that the similarity was sufficient to justify an inference of fraudulent intent on defendant's part.

In *Wolfe vs. Barnett & Lion, supra,* the facts were as follows: Plaintiffs manufactured gin in Holland and put it up in bottles with uniform and peculiar marks and labels. The name "Wolfe's Schiedam Aromatic Schnapps" impressed on the bottles and forming part of the labels, was devised by him to denote his goods thus made and sold. Defendant put up and sold a gin, adulterated with water, in

bottles similar in appearance to those of plaintiff, with labels which were merely colorable imitations of the name, mark, devices, and symbols of plaintiff, being headed "Wolfe's Aromatic Schiedam Schnapps" and signed at the foot "Wolfe," instead of "Udolpho Wolfe" of the genuine label, and with words blown on the sides of the bottles similar to those on plaintiff's. The court held this a clear case of infringement.

The Court of First Instance laid considerable stress upon the distinguishing marks which appellant had added to differentiate his gin from all other gin on the market (R., 12). The evidence shows (R., 41-42) that at the time of the filing of the complaint, plaintiff's gin had only two labels, as did that of defendant, and that most of the differentiating marks on appellant's bottles were added thereafter. The opinion of the court results in this proposition, which appellant contends is supported neither by reason, nor by justice, nor by the authority of the cases, namely, that as long as appellant was able to add labels or marks of any description to his bottles sufficient to distinguish his product from that of appellee, the latter might with impunity imitate the appearance of appellant's bottles. Appellant contends that the law is precisely the contrary of this proposition, *i. e.*, that the duty rested on the appellee to take pains to distinguish the dressing of his gin from that of appellant's gin sufficiently to prevent the deception of the consuming public and submits the following cases in support of that contention:

Chas. E. Hires Co. vs. Consumers' Co., 41 C. C. A., 71; 100 Fed. Rep., 809, 813-814.

Sterling Remedy Co. vs. Spermine Medical Co., 50 C. C. A., 657; 112 Fed. Rep., 1000, 1003-1004.

Kouffel & Esser Co. vs. H. S. Crocker Co., 118 Fed. Rep., 187, 190.

Nat'l Starch Co. vs. Koster, 146 Fed. Rep., 259.

Wolf Bros. & Co. vs. Hamilton-Brown Shoe Co., 91 C. C. A., 363; 165 Fed. Rep., 413, 417-418.

The following are extracts from the opinions in some of the above cases:

> "The defendant is not deprived of the right to market its root beer, but, at its peril, must see to it that its product is not dressed in the clothes of another."
>
> *Charles E. Hires Co. vs. Consumers' Co., supra.*

> "The duty is cast upon the defendant of deciding for itself, as we remarked in *Hires Co. vs. Consumers' Co., supra*, 'how near he may with safety drive to the edge of the precipice and whether it be not better for him to keep as far from it as possible.' If the term be a descriptive one, the article to which it is applied must be differentiated in form, dress, and color, that the public may not be imposed upon and the complainant defrauded of its rights."
>
> *Sterling Remedy Co. vs. Spermine Medical Co., supra.*

> "The law applicable to this case may be stated in a few words. It requires the defendant in offering his goods to the public, to use such methods of wrapping, labeling, and cataloging of his packages as not to lead an intending purchaser, of ordinary intelligence, using ordinary care, into the mistaken belief that he is purchasing goods placed upon the market by the complainant, when in fact he is purchasing the defendant's goods."
>
> *Keuffel & Esser Co. vs. H. S. Crocker Co., supra.*

B.

Appellant contends further that the Court of First Instance erred in holding the evidence insufficient to show the requisite intention on appellee's part prescribed by section 7 of the act. Such an intention on appellee's part is not shown affirmatively by the evidence. Appellee, of course, expressly repudiated ever having entertained an in-

tention to simulate the appearance of appellant's product (R., 69). Such a repudiation, even though under oath, is entitled to no weight. *Walter Baker & Co. vs. Baker*, 77 Fed. Rep., 181, 184. Appellant contends that the resemblance, in appearance, between his product and that of appellee is so close as to warrant an inference of fraudulent intent on appellee's part.

The tendency of the decisions is to accept evidence of close resemblance in the appearance of the products of rival manufacturers, such as is likely to deceive the ultimate consumer, as strong evidence of fraudulent intent, on the general principle that the law considers persons to intend the natural and probable consequences of their acts.

28 *Am. & Eng. Encyc.* (2d ed.), 418.

R. Heinisch's Sons Co. vs. Baker, 86 Fed. Rep., 765, 769.

Paris Medicine Co. v. W. H. Hill & Co., 42 C. C. A., 227; 102 Fed. Rep., 148, 151.

Enoch Morgans' Sons Co. vs. Whittier-Coburn Co., 118 Fed. Rep., 657, 661.

Devlin vs. M'Leod, 135 Fed. Rep., 164, 166.

Wirtz vs. Eagle Bottling Co., 50 N. J. Eq., 164, 167-8; 24 Atl., 658, 659.

Taylor vs. Taylor, 2 Eq. Rep., 290; 23 L. J. Ch., 255.

In *Enoch Morgans' Sons Co. vs. Whittier-Coburn Co.*, *supra*, the court said:

> "In the present case the evidence shows that the goods of the defendant have been mistaken by purchasers for those of the complainant, probably by the design of the dealer. And, though there is no evidence connecting such dishonest dealing with the defendant in any way, the fact that it so dresses its goods as to give easy opportunity to the unscrupulous dealer to delude the consuming purchaser is very persuasive evidence that an intention existed to enter into competition with the manufacturer

> whose goods were already well established and to carry on such competition in a manner which courts of equity hold to be unfair."

And in *Devlin vs. McLeod*, *supra*, the following rule is laid down:

> "True, fraud, in cases of unfair competition, is the essence of the relief sought and should be clearly proved; but where a similarity of style and color of label, type, size of package, spacing, and marginal lines, when collocated, is present, the existence of a wrongful intention in a case like this is persuasive. Moreover, when it is apparent that confusion is likely to arise because of the imitation and resemblance, an intent to deceive may be presumed. There is no conclusively direct evidence that confusion has resulted from the similarities pointed out, nor is there evidence of actual sales of one product for the other, or even of a mistake of one for the other, or any representation of palming off the toothache gum of defendant for that of complainant. Nevertheless by the adoption of the collocated prominent features found in complainant's label and style of dress, an attempted deception is shown, and no such differentiation in the vendible goods of the defendant exists as to warrant a denial of the protection of a court of equity."

In *Peck's Medicine Co. vs. W. H. Hill Co.*, *supra*, Lurton, circuit judge, said:

> "Where there are found strong resemblances, the natural inquiry for the court is, why do they exist? If no sufficient answer appears, the inference is that they exist for the purpose of misleading."

In *Taylor vs. Taylor*, *supra*, the court said:

> "Resemblance is a circumstance which is of primary importance for the court to consider, because, if the court finds, as it almost invariably does find in a case such as this, that there is no reason for

> the resemblance, except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading."

In *Wirtz vs. Eagle Bottling Co., supra*, Van Fleet, V. C., commenting upon the testimony of defendant's general manager, to the effect that he gave no directions to imitate complainant's labels, and that in designing defendant's labels he had no purpose of palming off defendant's goods as those of complainant, stated the rule as follows:

> "Admitting all this to be true, it is manifest it constitutes no defense. The vital question, in cases of this kind, is not, what did defendant mean? but what has he done? The legal quality of an act, resulting in injury, must be decided, not by the motive with which it was done, but by the consequences which have necessarily resulted from it. *The law, in civil cases, does not attempt to penetrate the secret motive which induced the act brought in judgment, but judges its legal quality solely by the consequences which have naturally and necessarily proceeded from it. It is no less a dictate of justice than of sound reason that every person must be understood to have intended to do just what is the natural consequence of his act deliberately done.*" (Italics ours.)

The language of section 7, Act No. 666, is pertinent here as showing what sort of evidence is required to satisfy an inference of fraudulent intent. That section provides:

> "* * * in order that the action shall lie under this section, actual intent to deceive the public and defraud a competitor shall affirmatively appear on the part of the person sought to be made liable, *but such intent may be inferred from similarity in the appearance of the goods as packed or offered for sale to those of the complaining party.*" (Italics ours.)

The Court of First Instance held (Rec., 15-16) that whatever inference of fraudulent intent on defendant's part there might be from the similarity in the appearance of ap-

pellant's and appellee's products was rebutted by (*a*) appellee's letter of July 31, 1905 (Ex. "B," R., 79), in which appellee expressed his willingness to discontinue the use of the "Dos Campanas" label if appellant would convince him that his (appellant's) label was registered, and (*b*) appellee's offer to allow Benito Legarda, appellant's partner, to examine his (appellee's) books with a view to a settlement of the controversy between appellant and appellee.

As offsetting this evidence of apparent good faith and as showing fraudulent intent on appellee's part, appellant submits the following facts in addition to the close resemblance in "general appearance" of appellee's product to his, heretofore discussed:

(*a*) The fact that appellee knew of appellant's trademark and seal at the time he (appellee) began to use a trademark and seal similar thereto (R., 69, 72-73).

(*b*) The fact that appellee used the seal some time after he began using the "Dos Campanas" trademark and after appellant had adopted his seal (R., 32, 69).

(*c*) The fact that appellee continued to use a dressing for his gin similar in appearance to that of appellant for five months, according to his own admission, after his apparently conciliatory letter of August 31, 1905, *i. e.*, for more than half of the entire period of time appellee admits he used such dressing (R., 52).

(*d*) The fact that appellee offered to submit his books to the inspection of Benito Legarda, appellant's partner, and not to appellant himself (R., 34).

(*e*) The fact that appellee's books did not show the quantity of gin sold of each brand, so that it would be impossible to tell therefrom how much of the "Dos Campanas" brand had been sold and the consequent damage to appellant; wherefore appellee's offer to allow an inspection of his books as a means of settling this controversy was a mere pretense of good faith on his part (R., 51).

(*f*) The fact that appellee has contested appellant's rights at every point throughout this entire litigation, maintain-

ing not only that appellant is not the legal owner of the trademark claimed by him, but also that the trademark used by him (appellee) is not an infringement of the Three Bells trademark, and that the dressing in which he (appellee) puts up his gin for sale on the market does not resemble the appearance of appellant's product; and all this despite the fact that appellee's trademark, according to his own admission (Ex. "B," R., 79), was not registered.

(*g*) The fact that appellee's seal bears a facsimile of a medal similar in appearance to that appearing on appellant's seal, notwithstanding the fact that there is absolutely nothing to show that appellee was ever awarded a medal for his gin (Ex. "N," R. 86).

IV.

Appellant contends further that the allegations in his complaint and the facts proved at the hearing are sufficient to warrant judgment in his favor under section 3 of Act No. 666 defining trademark infringement and providing a remedy therefor.

Section 3 is as follows:

> "The ownership or possession of a trademark, heretofore or hereafter appropriated, as in the foregoing section provided, shall be recognized and protected in the same manner, and to the same extent, as are other property rights known to the law. To this end any person entitled to the exclusive use of a trademark to designate the origin or ownership of goods he has made or deals in, may recover damages in a civil action from any person who has sold goods of a similar kind, bearing such trademark, and the measure of the damages suffered, at the option of the complaining party, shall be either the reasonable profit which the complaining party would have made had the defendant not sold the goods with the trademark aforesaid, or the profit which the defendant actually made out of the sale of the goods with the trademark, and in cases where actual intent to mis-

> lead the public or to defraud the owner of the trade-mark shall be shown in the discretion of the court, the damages may be doubled. The complaining party, upon proper showing, may have a preliminary injunction restraining the defendant temporarily from use of the trademark pending the hearing, to be granted or dissolved in the manner provided in the code of civil procedure, and such injunction upon final hearing, if the complainant's property in the trademark and the defendant's violation thereof shall be fully established, shall be made perpetual, and the injunction shall be part of the judgment for damages to be rendered in the same cause as above provided."

Appellant contends that the words "bearing such trade-mark" do not mean bearing the identical trademark but bearing a trademark so similar to that of the "person entitled to the exclusive use of a trademark" as to satisfy the requirements of the law as to trademark infringement.

The above section omits all mention of intention on the infringer's part to defraud the owner of a trademark, except as an element of aggravation, and makes the act of infringement alone sufficient. This is in accord with the rule laid down by this court in *Elgin National Watch Co. vs. Illinois Watch Company*, 179 U. S., 665, 674:

> "If a plaintiff has the absolute right to the use of a particular word or words as a trademark, then if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained."

Appellant's ownership of the "Tres Campanas" trademark has been discussed previously. It remains to determine whether the "Dos Campanas" label of appellee infringes that of appellant.

The test of trademark infringement is thus put by Mr. Justice Clifford in the leading case of *McLean vs. Fleming*, 96 U. S., 245, 256:

> "Two trademarks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other."

The points of similarity between appellee's and appellant's trademarks are these:

(*a*) Both are of the same shape and size, and of the same general appearance and color.

(*b*) Both have the two concentric circles.

(*c*) Both have the name of the gin and of the distiller printed in similar type in the space between the two circles.

(*d*) Both have bells, stamped in gold and tied at the top with a bow and the sheaf of some cereal, and below the bells the words "Extra Superior," all within the inner circle.

(*e*) Both have the words "Para evitar," etc., in script around the upper part of the outer circle and the word "Manila" in printed letters below.

(*f*) Both have the signature of the distiller stamped in black across the label in the same direction.

The points of difference between appellee's and appellant's trademarks are merely these:

(*a*) In the space between the two circles appellee's label has "Dos" (two) instead of "Tres" (three) as on appellant's trademark, and "Gabino Barretto" instead of "Patricio Ubeda."

(*b*) In the inner circle of appellee's label are two bells instead of three as on appellant's trade-mark.

(*c*) The signature across appellee's label is "Gabino Barretto" instead of "Patricio Ubeda."

(*d*) The outer edge of appellee's label is plain whereas that of appellant's trademark is serrated.

The exhibits do not show, and the opinion is not clear, as to whether appellant's trademark was embossed and that of appellee was not. The lower court (R. 12) points this

out as one of the differences. But earlier in the opinion (R., 10), in enumerating the differences between the registered mark and the mark later used by appellant, the court said:

> "The difference between the registered mark and the other is quite noticeable, because the words and devices on the latter are not embossed, as is the case with said registered mark."

It is well settled that the fact that a defendant uses his own name in connection with the infringing mark is no defense.

Hopkins, Trademarks (2d ed.), sec. 155.
Menendez vs. Holt, 128 U. S., 514, 521.
Leonard vs. White's Golden Lubricator Co., 38 Fed. Rep., 922, 923.
Battle vs. Finlay, 50 Fed. Rep., 106, 107.
N. K. Fairbank Co. vs. Central Lard Co., 61 Fed. Rep., 133, 136.

Thus in *Menendez vs. Holt, supra*, Mr. Chief Justice Fuller said:

> "Holt & Company then having acquired the exclusive right to the words 'La Favorita,' * * * it is no answer to their action to say that there was no invasion of that right because the name of S. A. Ryder accompanied the brand upon tobacco sold by appellants, instead of the name of Holt & Company. This is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor."

On the principle of these cases appellant submits that the fact that the name "Cabino Barretto," though not the name of the appellee, but of a third party, was substituted for "Patricio Ubeda," appellant's name, is likewise no defense.

Appellant contends further that while the above differences are apparent upon an examination of the trademarks side by side, the similarity in the collocation of the words and devices as well as in the style of type used is such as to deceive the ordinary consumer purchasing gin at retail, and this, under the authorities cited in the discussion of the case from the standpoint of unfair competition, which authorities are applicable here as well, is the proper test to be applied.

Both the Court of First Instance and the Supreme Court held that appellant's *Three Bells* trademark resembled the *One Bell* mark formerly belonging to Van Den Bergh & Co., so nearly as to make the former a mere imitation of the latter (R., 16-17, 149-150). Notwithstanding this fact the Court of First Instance was unable to see sufficient resemblance between the *Three Bells* trademark of appellant and the *Two Bells* mark of appellee to constitute the latter an infringement of the former. This position is manifestly inconsistent, for the similarity of Three Bells and the Two Bells marks is closer than that of the Three Bells and the One Bell marks.

The Court of First Instance laid particular stress upon the fact that gin with marks containing from one to five bells was obtainable on the market as indicating the improbability that the public was deceived by the "Dos Campanas" brand of appellee.

The court said (R., 13):

> "If there had been only two brands of gin, that is to say, 'Dos Campanas' and 'Tres Campanas,' it might be said that the manufacturer and dealer in one of these brands had attempted to imitate the other brand, or to offer the goods for sale in bottles which would lead the public to believe that his gin was the same gin made by the other manufacturer using a similar label.
>
> "The very fact that here existed, or was offered for sale, gin in bottles bearing different marks, with

> different numbers of 'Campanas' (bells), from one to five, will convince us that the public could tell the difference between the various brands rather than confuse these two particular brands of 'Dos Campanas' and 'Tres Campanas.'"

However, there was no proof adduced to show that any one had a lawful property right in any of these several bell trademarks. It was shown, however, that appellant was the legal owner of the Three Bells trademark, and, as previously pointed out under section 11 of Act No. 666 the certificate of ownership issued to him was conclusive evidence of appellant's exclusive right of ownership of said trademark. It is apparent, therefore, that the several bell gin trademarks in use were all nothing more than infringements of appellant's trademark. Hence, the opinion of the court as to this matter substantially reduces itself to the proposition that appellant had no right to complain of appellee's infringement because appellant's mark was being infringed by others.

Appellant contends that this is fundamentally wrong and submits the following authorities in support of that contention:

> *Hopkins, Trademarks* (2d ed.), sec. 155.
> *Browne, Trademarks* (2d ed.), sec. 685.
> *Taylor vs. Carpenter*, 3 Story, 458; 23 Fed. Cas., 742.
> *Caswell vs. Jacob Henkell Co.*, 50 Fed. Rep., 171, 172.
> *Actiengesellschaft Vereinigte Ultramarin Fabriken vs. Ludwig*, 48 C. C. A., 264; 109 Fed. Reps., 151, reversing 102 Fed. Rep., 551.

In *Taylor vs. Carpenter, supra*, Story, J., said:

> "Again it has been said, that other persons have imitated the same goods and labels of the plaintiffs, and sold the manufacture. But this rather aggravates than excuses the misconduct unless done with the consent or acquiescence of the plaintiffs, which there is not the slightest evidence to establish, or that the plaintiffs ever intended to surren-

> "der their rights to the public at large, or to the
> "invaders thereof in particular."

And *Lacombe, Cir. J.*, in *Cuervo vs. Jacob Henkell Co.*, *supra*, said:

> "Complainant is not to be deprived of his trade-
> mark because other owners of other trademarks suffer
> infringement without objection; and as to other imi-
> tations of his own trademark there is not a particle of
> evidence to show that these were made or sold with
> his consent or acquiescence. This defense has been
> so frequently and forcibly condemned by authority
> that further discussion is profitless."

In his complaint plaintiff and appellant prayed the court to award him double damages, as provided for in sections 3 and 7 of Act No. 666, on the ground that defendant and appellee had infringed his trademark with the malicious purpose of defrauding him (R., 4). This aspect of the case has been thoroughly canvassed under the discussion of the case from the standpoint of unfair competition (pp. 68-73, *supra*). Further argument on this question may therefore be dispensed with here.

On the question of the sufficiency of the similarity between appellee's and appellant's trademarks to make the former an infringement of the latter, appellant submits the following cases by way of illustration:

Emblem of anchor on wire, infringed by emblem of anchor surmounted by crown. *Edelstein vs. Edelstein*, 7 L. T. R., N. S., 768.

> "In the first place I must look at the tickets and in-
> quire whether a large part of that which impresses
> the eye has been taken; and I must answer that it
> has. I find that the two elephants in the two top cor-
> ners of the plaintiff's ticket are repeated in the two
> top corners of the defendant's ticket. It is quite true
> that the elephants are in a different position—the de-

fendant's elephants have howdahs upon them, and the plaintiff's have not, and the trunks are turned in different directions, but still in each corner there is an elephant; that impresses the eye with a considerable amount of similarity."

Orr-Ewing vs. Johnston, L. R., 13 Ch. D., 434, 445.

"Mottled German Soap," with a circle having a moon and several stars in the middle, infringed by "S. W. McBride's German Mottled Soap" (McBride being the maker), in connection with a crescent having a single star within it, notwithstanding that "Mottled German Soap" or "Mottled Soap" had been in common use for fifty years and was well known to the trade. *Procter vs. McBride*, Cox., Man., Trade-mark Cases, 382; 20 Fed. Cas., 3.

Label of bow and arrow with word "Apollinis" on mineral water bottles, infringed by label with anchor and word "Apollinaris." *Apollinaris Brunnen vs. Seaburn*, 11 Blatch., 380; 1 Fed. Cas., 1067.

"Maizena," with allegorical picture of Indian preparing corn and corn flour, infringed by "Maizharina," with picture of a man carrying maize. *Glen Cove Mfg. Co. vs. Ludeling*, 22 Fed. Rep., 823.

"Hostetter's Stomach Bitters," medicine, infringed by "Thellers' Celebrated Stomach Bitters," with similarity of details on label and same peculiar form and color of round-shouldered, short-necked bottles. *Myers vs. Theller*, 38 Fed. Rep., 607.

Picture of a chicken cock standing upright within a circle with names "Old Bourbon Whiskey, Bourbon County, Ky." and "From J. A. Miller, Paris," known as "Chicken Cock Whiskey," infringed by a like picture with "Miller's Golden Cock Rye," the complainant having used its mark on barrels, and respondents on both barrels and bottles. *G. G. White Co. vs. Miller*, 50 Fed. Rep., 277.

Word "star" with symbol of star infringed by word "star" with symbol of star and crescent. *Hutchinson vs. Blumkey*, 51 Fed. Rep., 829.

A plain red Greek cross infringed by Greek cross of a slightly different pattern and having in a red circle in the center the letters "B. & B." *Johnson & Johnson vs. Bauer & Black*, 27 C. C. A., 374; 82 Fed. Rep., 662; reversing 79 Fed. Rep., 954.

"Uneeda" infringed by "Iwanta." *National Biscuit Co. vs. Baker*, 95 Fed. Rep., 135.

Trademark for pale ale consisting of an equilateral triangular figure red in color, infringed by a nearly equilateral triangle of red on pale and half and half with a narrow gold border, a monogram of the letters "C" and "F" in the middle, and some fine scroll ornamentation in the corners. *Bass, Ratcliff & Gretton, (Ltd.), vs. Feigenspan*, 96 Fed. Rep., 206.

Trademark consisting of full-length figure of waitress called "La Belle Chocolatiere," infringed by full-length picture of a woman in Puritan costume, differently colored and differently faced, with rock to the left and with the name of the defendant. *Walter Baker & Co., Ltd., vs. Puritan Pure Food Co.*, 189 Fed. Rep., 680.

Representation of a chicken cock standing under the branch of an olive tree, with the words "Extra Pura" and the words "Olio D'Oliva" placed above, and the words "Trade Mark" & "E. Cusimano & Co., Palermo, Italy," under the facsimile, infringed by the picture of a "rooster" standing on the body of his dead adversary, with the word "Victoria" above and the words "Virgine Olio D'Olive" below. *Cusimano & Co. vs. Olive Oil Importing Co.*, 114 La. Ann., 311.

The following are taken from the Patent Office rulings:

"Swan" gin, infringed by "Black Swan." *Cairo, ex parte*, 15 O. G., 248.

Shield with eagle thereon, and an eagle bearing a shield, infringed by a shield and "Shield Brand." *Coon, ex parte*, 58 O. G., 946.

Crouching cat with words "Old Tom" on gin, infringed by cat in standing position with words "Old Tom." *Kaufmann & Blacke, ex parte,* 84 O. G., 145.

"Donkey" soaps infringed by figure of bridled and saddled donkey. *Woolwine, ex parte,* 97 O. G., 1373.

Figure of owl and words "We Never Sleep" on ladies' and children's shoes, infringed by figure of head and upper part of owl and words "Owl Shoe" on men's and boys' shoes. *B. A. Corbin & Son Co., vs. Miller, Kohlhepp, Giese & Co.,* 98 O. G., 1485.

"Silver Leaf," with group of three maple leaves, on lard, infringed by "Maple Leaf" with two maple leaves. *Vogel & Son, ex parte,* 99 O. G., 2321.

A Maltese cross with monogram and other inscriptions, infringed by a Maltese cross without inscription and monogram, for boots and shoes. *Smith Briscoe Shoe Co., ex parte,* 117 O. G., 1491.

"Flor de Daniel Webster" on cigars, infringed by "Daniel Webster" though the embellishments of the two marks were totally different. *Sen. May* 5, 1887, Compilacion Legislativa de Ultramar, Tomo 6, p. 1403. In this, the leading Spanish case on trademark infringement, the Tribunal Supremo said:

> "Plaintiff, D. Louis Marx, a cigar manufacturer, was legally using the mark 'Flor de Daniel Webster' at the time when Alvarez Garcia & Co. applied for and secured the certificate for another mark with only 'Daniel Webster.' The essential part of said first trademark, its most salient and characteristic feature, which when applied to another mark might lead the consumer into error, is the name and surname of the American jurist thereby expressed. The variations that may be noted in the stamps, designs, and borders of the two marks are of no importance whatsoever. Therefore the decision appealed from, which, in dismissing plaintiff's complaint, is based upon those differences of detail, interprets erroneously

the letter and spirit of the royal decree of November 20, 1850, made applicable to Cuba by the royal order of March 31, 1882, and violates article 7 thereof, under which manufacturers cannot adopt for their products such distinctive marks for which others may have obtained a certificate previously."

V.

The evidence is not clear as to whether or not appellee was using the infringing trademark and imitative dressing for his gin at the date of the filing of the complaint. Appellee on his part testified that he had used the Two Bells mark only down to the latter part of December, 1905 (R., 52), that is to say, down to within a few days prior to the filing of the complaint in this cause on January 4, 1906 (R., 1). The fact that appellee had ceased infringing appellant's mark and simulating the dressing of appellant's gin before suit was brought, is of course no bar to appellant's claim for damages for prior infringement or unfair competition. And under the holding of the following cases such cessation is no bar to appellant's right to an injunction where, as here, the right of the complaining party is contested at every step:

Hutchinson vs. Blumberg, 51 Fed. Rep., 829, 831.

Bass, Ratcliff & Gretton, Ltd., vs. Guggenheimer, 69 Fed. Rep., 271.

Thomas G. Plant Co. vs. May Mercantile Co., 153 Fed. Rep., 229, 231.

In *Hutchinson vs. Blumberg, supra*, the court said:

"It is also further urged in behalf of the defendant that, on being notified by the complainants that he was infringing their trademark, he gave notice to persons to whom he had sold star and crescent goods to erase the star from the marks upon the goods, and that he has since gone out of business, and therefore no decree for any injunction should be awarded

> against him. If the proof had shown that the defendant, at once, on being notified of his infringement, had, in good faith, abandoned the use of complainants' trademark, his conduct in that respect might be considered by the court in fixing the terms of the decree. But the record shows that the defendant has contested every step of the case. He has put the complainants to the expense of proving every fact necessary to establish their right to the use of the trademark in question and also the fact of his (defendant's) infringement, and even, only a very few days before the case was brought on for a final hearing, put in additional proof upon the point of complainants' right to the use of the word and symbol 'Star.'"

The same principle is laid down in the following from *Thomas G. Plant Co. vs. May Mercantile Co., supra:*

> "Defendant claims that it ceased selling these shoes before the bill of complaint was filed. Aside from the fact that this could not be known to complainant, I do not think that it can defeat an injunction in a case of this kind, where the defendant continued to sell after notification and has contested complainant's right throughout this suit."

Conclusion.

In conclusion appellant respectfully submits that from the aforegoing arguments it sufficiently appears:

I. That he is entitled to the relief prayed in his complaint under section 3 of Act 666, for the complaint alleges and the evidence shows:

A. That at the time of the filing of his complaint he was the owner of the Three Bells trademark;

B. That appellee infringed that trademark in using the "Dos Campanas" label previously described;

C. That such infringement was made with the fraudulent intent of misleading the public and injuring appellant.

II. That he is entitled to relief under section 7 of Act No. 666, for the complaint alleges and the evidence shows:

A. That appellee has simulated the "general appearance" of the dressing of his (appellant's) gin sufficiently to deceive the retail purchaser;

B. That such simulation was made "for the purpose of deceiving the public and defrauding appellant."

We respectfully submit that the judgment below should be reversed.

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